Supreme Court, U.S.
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92-1902
No. ____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

VIENNA MORTGAGE CORPORATION,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for the National Bank of Washington,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred when it departed from precedent of the Seventh and Eleventh Circuits and held that 12 U.S.C. § 1823(e) authorized the Federal Deposit Insurance Corporation ("the FDIC") as receiver for a failed depository institution to disavow its obligations in a complex, multi-party commercial transaction and retain the consideration for that transaction when:

a. Section 1823(e) has been universally applied since its original enactment in 1950 as part of the Federal Deposit Insurance Act only to bar defenses (such as release or accord and satisfaction) in suits on promissory notes and related unilateral obligations;

b. Congress re-enacted section 1823(e) in 1989 as part of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") after the Seventh and Eleventh Circuits had already held it inapplicable to bilateral contracts;

c. The Fourth Circuit's interpretation of section 1823(e) would by implication overrule the common law doctrine of *D'Oench, Duhme*, promulgated by this Court in 1942;

d. The obligations disavowed by the FDIC were integral components of a unitary transaction undertaken with the knowledge, encouragement and assent of three federal banking regulatory agencies, including the FDIC; and

e. The FDIC itself conceded that petitioner was entitled to an offset by the amount of consideration which the FDIC retained.

2. Whether petitioner's compulsory Counterclaim was erroneously dismissed for failure to exhaust the FIRREA administrative process, 12 U.S.C. § 1821(d), when the decision on the FDIC's Complaint inevitably barred further proceedings on petitioner's Counterclaim by application of the doctrines of *res judicata* and collateral estoppel.

3. Whether this Court's decision in *Langley v. FDIC*, 484 U.S. 86 (1987), precludes all defenses in suits governed by 12 U.S.C. § 1823(e) other than satisfaction of the statute, when the defenses in question are equitable in nature and based upon the conduct and actions of federal banking regulatory agencies rather than those of the former officials of a failed depository institution.

IDENTIFICATION OF PARTIES AND STATEMENT PURSUANT TO RULE 29.1

Petitioner in this proceeding is Vienna Mortgage Corporation, which was known during the consummation of the transaction at issue and through the commencement of proceedings in the court of appeals as Washington Mortgage Group. Vienna Mortgage Corporation has no subsidiaries; its parent company is Washington Mortgage Financial Group, Ltd.

Respondent is the Federal Deposit Insurance Corporation, as receiver for the National Bank of Washington.

The Mortgage Bankers Association of America participated as amicus curiae before the Fourth Circuit.

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Petitioner Vienna Mortgage Corporation respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the captioned case.

OPINIONS BELOW

The opinion of the court of appeals dated February 5, 1993 (A1) is presently unpublished, although respondent moved for its publication on April 7, 1993, on the ground that the issues involved are "of great national concern" (E1). The orders of the court of appeals dated March 2, 1993, denying petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is reproduced at Appendix pages C1-4. The four orders of the district court dismissing petitioner's counterclaim, granting respondent's motion for summary judgment, awarding prejudgment interest, and denying petitioner's motion for relief from judgment are reproduced at Appendix pages B1-4. Excerpts from two pertinent bench rulings appear at Appendix pages D3-6 and F1-7.

JURISDICTION

The orders of the court of appeals denying petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc were issued on March 2, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1821(d)(5)(A)(i):

> Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

12 U.S.C. § 1823(d)(6)(A):

> Before the end of the 60-day period beginning on the earlier of—
>
> (i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or
>
> (ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),
>
> the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

12 U.S.C. § 1821(d)(13)(D):

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1823(e):

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

This case concerns an attempt by the Federal Deposit Insurance Corporation ("the FDIC") to grant itself extraordinary powers as receiver for failed depository institutions and expand the scope of this Court's decision in *Langley v. FDIC*, 484 U.S. 86 (1987). In acting as receiver for the National Bank of Washington ("NBW"), the FDIC asserted authority not only to disavow a portion of a complex, multi-party commercial transaction entered into by NBW but to retain the consideration received by the bank in that transaction. The FDIC purported to do so on dual grounds: First, that 12 U.S.C. § 1823(e) purportedly applied to all contracts with failed depository institutions, as opposed to those pertaining to promissory notes and related unilateral obligations; and Second, that *Langley v. FDIC* precluded the assertion of all defenses by a party to a covered agreement other than satisfaction of the statute.

The portion of the transaction disavowed by the FDIC obligated NBW to pay a $770,105.45 fee to Vienna Mortgage Corporation ("VMC") upon the termination of VMC's right to service a portfolio of multifamily mortgages held by NBW. This obligation was but one element of an integrated, multi-party transaction by which VMC was sold to its current owners as part of a plan to infuse cash into NBW and stave off its insolvency. The FDIC disavowed NBW's obligation to pay VMC its fee upon terminating its rights as servicing agent. The FDIC did so even though it retained consideration in excess of $3 million that NBW received from VMC in the overall transaction and despite the fact that three federal banking regulatory agencies had expressly represented that the transaction would be honored even were NBW to be placed in receivership.

This case is by no means the only one in which the FDIC's legal actions as receiver for NBW are suspect. In *Washington Bancorporation v. Said*, 812 F. Supp. 1256, 1274 (D.D.C. 1993), the U.S. District Court for the District of Columbia

sanctioned the FDIC under Rule 11, Fed. R. Civ. P., for bringing suit against the former officers and directors of NBW because its claims "were insupportable as a matter of law." This same court, in *In Re: NBW Commercial Paper Litigation ("In Re: NBW")*, Master File No. 90-1755 (RCL) (Mar. 11, 1992) (Mem. Op. and Order) (G1-54), specifically rebuffed the FDIC's attempt to apply 12 U.S.C. § 1823(e) outside of the context of suits on promissory notes and related obligations. This decision would have bound the FDIC here, had not the court of appeals erroneously and improvidently separated the adjudication of the FDIC's Complaint from VMC's compulsory Counterclaim.

A. Background Of The VMC Sale Transaction

Prior to the transaction which gave rise to this litigation, NBW and VMC[1] were both wholly-owned subsidiaries of Washington Bancorporation ("WBC"). On April 7, 1988, these two entities entered into a Whole Loan Sale and Servicing Agreement which, in relevant part, appointed VMC as servicing agent of all mortgage loans owned by NBW and remunerated VMC for these services (A3). Due to the common ownership of these two entities at that time, there was no reason for the original Servicing Agreement to contain a provision for a termination fee in the event that NBW terminated VMC's services (JA 183, 418[2]).

Two years later, when VMC was sold as a separate entity in a complex multi-party transaction, this Whole Loan Sale and Servicing Agreement was amended to provide for VMC to be paid a fee in the event that it was terminated as NBW's servicing agent (A4). The FDIC contended that despite this change in

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[1] Until after the conclusion of proceedings in the district court, VMC did business under the name Washington Mortgage Group ("WMG"). In all respects and for all purposes of this proceeding, VMC has succeeded to the interests of WMG (A2).

[2] The references to "JA" followed by page citations are to the parties' joint appendix in the court of appeals.

ownership, the sizeable financial benefits realized and retained by NBW as a consequence of this change, and the knowledge and encouragement of the federal government in this transaction, this Amendment was unenforceable. It was the FDIC's disavowal of this single element of the transaction of sale of VMC that gave rise to this proceeding.

The roots of the VMC sale date back to the early part of 1990 when WBC, acting on behalf of itself and its subsidiaries, commenced negotiations to sell VMC to Washington Mortgage Acquisitions, Inc. ("WMA") (A4). NBW participated in these negotiations both on its own behalf and as a subsidiary of WBC (A4; JA 80-86, 418, 436-37). The sale of VMC to WMA was "overseen" and strongly encouraged by three of the federal government's bank regulatory agencies, including the FDIC (A4). They viewed the transaction as a means of infusing capital into WBC and NBW, the financial health of which were all in jeopardy (JA 183, 419-20, 426, 428-29, 436-37, 443-44).

The federal government was so interested in the financial condition of these organizations that a representative of the Federal Reserve Board ("the FRB") was stationed in the offices of VMC (JA 420, 438). Representatives of the Office of the Comptroller of the Currency ("the OCC") also met with the parties for the purpose of encouraging the sale of VMC (JA 420, 438). The deep and abiding interest of the FDIC in promoting the sale of VMC was evidenced by its correspondence to NBW's Executive Vice President and Chief Financial Officer (JA 95-99, 101-02, 426).

The importance of the encouragement and participation by the federal government in the sale of VMC cannot be overestimated. In the words of VMC's Executive Vice President:

> Through their oral and written representations to the parties, the federal banking regulatory agencies — including the FDIC — led the parties to the [VMC] sale transaction to understand and believe that the

> federal government strongly supported the consummation of the sale and would abide by its terms in the event either NBW or WBC became insolvent.
>
> * * * *
>
> Had the government not led WMA and VMC to believe that the regulatory agencies — including the FDIC — would abide by the terms of the sale agreement in the event of the insolvency of a party, the [VMC] sale transaction would never have been consummated.

(JA 443-44). The foregoing recitals of government representations and reliance by VMC were not disputed by the FDIC.

B. The Contract Of Sale

The sale of VMC was consummated in two steps in the late spring and early summer of 1990. The terms of this one, integrated transaction were memorialized in four documents: the Stock Purchase and Investment Agreement, the Amendment to the April 7, 1988 Whole Loan Sale and Servicing Agreement, the Loan Sale Agreement, and the Loan Servicing Transfer Agreement (A4). NBW was a party to all four documents and four of its officers participated in the negotiation of the sale (JA 183, 421, 439, 441). Alone among the four sale documents, the FDIC repudiated the Amendment to the Whole Loan Sale and Servicing Agreement.

The Stock Purchase and Investment Agreement, the first of the four sale documents, was executed on May 19, 1990 (JA 50-79, 184, 439). It established the framework of the transaction pending final negotiations, regulatory approval, and an opinion letter later supplied by NBW's Corporate Counsel (JA 71, 106-09, 423). The Stock Purchase and Investment Agreement obligated WMA to make a minimum contribution of $2 million to VMC, required VMC to make a $500,000 cash payment to WBC from these funds, and called for VMC to relieve NBW of

the responsibility to undertake an approximately $1.9 million bailout of a nonperforming apartment complex. It also obligated VMC to pay NBW a sum in excess of $3.5 million and to assume certain nonconforming loans otherwise slated for inclusion in NBW's portfolio (A4; JA 184-85, 421-23).

The remaining three sale documents were executed on June 29, 1990, the same day that the other conditions of the sale (including assent of the FDIC, the OCC, and the FRB) were satisfied (A4; JA 185, 423).

The first of these three documents — the Loan Servicing Transfer Agreement — transferred the servicing rights of certain mortgages valued at approximately $35 million from VMC to NBW. This document was signed by the party who served as Chief Financial Officer of both WBC and NBW(JA 59-79).

The second document — the Amendment to the April 7, 1988 Whole Loan Sale and Servicing Agreement — gave VMC the right to a termination fee from NBW in the event that NBW terminated VMC as servicer of certain specified loans valued at approximately $76 million (A4; JA 120-23, 185, 424, 441-42). The termination fee provided by this Amendment, later disavowed by the FDIC, was of vital importance to VMC since it was giving a large amount of valuable consideration to NBW in exchange for a benefit that NBW could unilaterally terminate at any time (JA 424). The Amendment was also signed by the CFO of WBC and NBW, this time on behalf of WBC and its subsidiaries (JA 120-23).

The third document — the Loan Sale Agreement — involved the sale of a portfolio of mortgage loans from VMC to WBC (JA 124-30, 185-86, 425). The relevant portion of this document made clear that "the Amendment to the Whole Loan Sale and Servicing Agreement, dated as of June 29, 1990" was an agreement "between Purchaser, Seller and the Bank," *i.e.*, NBW (JA 28) . This agreement was also signed by the CFO of

WBC and NBW, this time by WBC with an acknowledgment by NBW (JA 185-86).

C. Consideration And Performance

The sale of VMC caused substantial consideration to flow to NBW (A4). At a minimum, NBW received approximately $3.6 million in cash from VMC, $1.1 million in cash from WBC out of its proceeds from the VMC sale, and relief from the significant potential liability of a nonperforming loan for which NBW would have ultimately been responsible (JA 421-22, 426-27, 439-41, 443). This project eventually went into default and thereby triggered the liability that would have been NBW's. This default, in turn, forced VMC to return a portfolio of multifamily loans serviced with the approval of the Government National Mortgage Association. The FDIC itself conceded that NBW did in fact receive this consideration from VMC (JA 237-38).

D. Conditions And Regulatory Approvals

The transaction in question was, as noted earlier, consummated in steps in order to finalize its terms and provide time to effect several conditions precedent, including receipt of approval from the FDIC, the OCC, and the FRB (JA 101-05, 186, 426). The FDIC's letter demonstrated that the agency was on notice of the details of the transaction. That writing also confirmed that the FDIC declined to object because: "It has been agreed . . . that NBW will receive $1.1 million at closing" and because "the bank's board has reviewed this transaction, has determined that the transaction is in the best interests of the bank's depositors and other creditors, and has delegated all necessary authorities to bank management as they relate to the bank's role in this transaction" (JA 101).

E. Post-Transaction Events

Barely one month later, in August of 1990, the FDIC declared NBW insolvent and assumed control of the bank as

receiver (A4). On October 25, 1990, the FDIC notified VMC that it was terminating VMC's rights as servicing agent of that portion of NBW's loan covered by the Amendment to the Whole Loan Sale and Servicing Agreement. No cause was given for the termination (A5). VMC's servicing rights were then given to a competitor.

VMC cooperated in the transfer of NBW's loan servicing rights and later remitted to the FDIC the funds that it was entitled to receive, net of VMC's termination fee (A5; JA 187, 427). The FDIC subsequently demanded that VMC return these funds on the ground that NBW was not a party to the VMC sale transaction (JA 187, 427-28). The FDIC also repeatedly stated that it was repudiating the Amendment alone among the four documents which codified the VMC sale transaction (*Id.*).

F. Proceedings Below

The FDIC filed suit to recover damages in an amount equal to VMC's termination fee in the U.S. District Court for the Eastern District of Virginia on August 2, 1991.[3] With its Answer, VMC also filed a compulsory Counterclaim which contained two counts: First, that the FDIC's attempt to deprive VMC of its termination fee constituted a breach of contract; and Second, that allowing the FDIC to void the obligation to pay VMC a termination fee while simultaneously retaining the consideration of the transaction of which payment of that fee was a part would unjustly enrich the FDIC (A3).

On November 1, 1991, the district court dismissed VMC's Counterclaim without prejudice, on the ground that VMC had not yet exhausted the FIRREA administrative claims process (A8-9, B1, F1). It did so in reliance upon the FDIC's representations that it would promptly review VMC's administrative claim so that it could again be joined with this action, thereby

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[3] The district court had original jurisdiction pursuant to 12 U.S.C. §§ 1819(a), 1819(b)(2)(A), and 28 U.S.C. §§ 1331, 1335.

avoiding prejudice to VMC (F5-6). VMC then promptly filed an administrative claim under FIRREA. Before that claim could be decided, the FDIC moved for and was granted summary judgment (B2).

Over the following months, the FDIC took no action to decide VMC's administrative claim. With the statutory time period prescribed by FIRREA set to expire, on June 22, 1992, VMC initiated suit in the U.S. District Court for the District of Columbia.[4] *Vienna Mortgage Corporation v. FDIC*, Civil Action No. 92-1467-NHJ (D.D.C.). The FDIC then moved to dismiss that action, on the ground that the earlier adjudication of its Complaint barred VMC's new suit by application of the doctrines of *res judicata* and collateral estoppel. After obtaining a stay of its new case, VMC returned to the Eastern District of Virginia and moved that court to grant it relief from the order entering summary judgment in favor of the FDIC. That motion was denied in an order dated October 14, 1992, even though the district court recognized that the FDIC had disavowed its earlier position (B4).

These orders and others were the subjects of two consolidated appeals to the Court of Appeals for the Fourth Circuit. Despite the complexity and importance of the issues at hand, on February 5, 1993, that court issued a brief *per curiam* opinion affirming the judgment below (A1). VMC then moved for rehearing and suggested that the circuit hear this case *en banc*. In two orders issued on March 2, 1993, the court of appeals declined to do so (C1-4). VMC now petitions this Court to issue a writ of certiorari.

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[4] Under FIRREA, it is this district court which has jurisdiction over affirmative claims against the FDIC as receiver for NBW. 12 U.S.C. § 1821(d)(6).

REASONS FOR GRANTING THE WRIT

I. The Parties Agree That This Case Concerns Issues Of National Importance.

The sections of this Petition which follow demonstrate that the court of appeals gravely erred in affirming judgment for the FDIC. Its decision that 12 U.S.C. § 1823(e) may be invoked by the FDIC to disavow contracts of every nature whatsoever is in conflict with precedent of the two other circuits as well as those district courts which have considered this issue. Remarkably, it is also in conflict with the decision of the district court which has jurisdiction over all affirmative claims against the FDIC in its capacity as receiver for NBW. By implication, and presumably inadvertently, the decision of the court of appeals would also render superfluous the doctrine created by this Court in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), one which has provided sure guidance for over fifty years to parties engaged in banking transactions. For these reasons alone, petitioner respectfully submits that the issuance of a writ of certiorari is warranted.

The importance of the issues presented in this case, however, cannot be fully appreciated when viewed solely from a legal perspective. As stated by the FDIC itself in moving the court of appeals to publish its decision (E1), this case raises matters of vital and current national interest — the extent of the authority of federal regulatory agencies charged with administering the resolution of the current crises in the banking and savings and loan industries. Without any delegation from the Congress, the FDIC arrogated to itself the powers to disavow all contractual obligations of failed banks by invoking 12 U.S.C. § 1823(e) and to retain the consideration received by the failed bank in disavowed transactions. In so doing, the FDIC expanded the statute's application in a manner never contemplated by Congress either in its original enactment in 1950 as part of

the Federal Deposit Insurance Act or during its re-enactment in 1989 as part of FIRREA.

The astonishing implications of the FDIC's position were astutely recognized by the district court with jurisdiction over affirmative claims arising from the FDIC's receivership of NBW, which held that the FDIC's construction of section 1823(e) would "radically alter the day-to-day transactions of the banking industry by requiring all customers and business associates of a bank to demand that all issues and agreements be placed before the board of directors (or loan committee)." *In Re: NBW* (G26). There is no language in the statute or legislative history behind its enactment to suggest that it was the product of "an intent by Congress" to confer such broad powers of avoidance upon the FDIC (*Id.*).

The prejudice to VMC of this unprecedented extension of the FDIC's regulatory authority was compounded by its argument that this Court's decision in *Langley v. FDIC* barred all defenses to an action like this one other than satisfaction of the four requirements of section 1823(e). In point of fact, *Langley* holds only that compliance with those requirements is not excused where fraud by principals of the failed bank is allegedly involved. Nothing in that case stands for the proposition that a party may not invoke equitable defenses — such as equitable estoppel and unjust enrichment — based upon the actions of federal banking regulatory agencies.

The improper application of the exhaustion doctrine fueled the defeat of VMC's legitimate defenses and claims. The court of appeals itself recognized that exhaustion of administrative remedies is not required where participation in the agency process would be futile (A9-10). It nonetheless affirmed the dismissal of VMC's Counterclaim believing that the adjudication of the FDIC's Complaint would not preclude pursuit of an claim under FIRREA (*Id.*). In point of fact, even before this appeal was concluded, the FDIC succeeded in barring VMC's

pursuit of its affirmative claim by arguing that the decision in this case, according to the doctrines of *res judicata* and collateral estoppel, precluded further litigation on VMC's claims (D1). This result worked an extraordinary injustice upon VMC because it would have succeeded in its affirmative claims had it been free to pursue them. *In Re: NBW* (G1-54).

This case, as can thus be seen, presents not only important legal issues and the need to resolve a conflict between the circuits. It raises genuine questions about the federal government's continuing administration of the affairs of failed depository institutions, a matter of profound national interest. In this one case, the FDIC unilaterally extended its powers beyond those delegated to it by Congress, expanded this Court's decision in *Langley* well beyond its natural boundaries, rendered the *D'Oench, Duhme* doctrine superfluous, and defeated the FIRREA claims process.

The district court intimately familiar with the actions of the FDIC in its receivership for NBW has already sanctioned it for failing to meet basic standards of responsibility in litigation. *Said*, 812 F. Supp. at 1274. Beyond erroneously interpreting and applying long-standing provisions of federal banking law, the decision of the court of appeals rewarded the FDIC for thwarting "the interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 61-62 (1984). It should, therefore, be reviewed by this Court.

II. The Decision Of The Court Of Appeals Is Erroneous, In Conflict With Precedent Of Two Other Circuits, And By Implication Renders The *D'Oench, Duhme* Doctrine Superfluous.

A. There Are Two Remedies Potentially Available To The FDIC As Receiver For Disavowing Contracts With Failed Depository Institutions.

The FDIC has two distinct remedies for challenging contracts which are contrary to its interests as receiver of a failed depository institution. The first of these is a creature of common law doctrine created by this Court in 1942 in *D'Oench, Duhme & Co.*, 315 U.S. 447. That doctrine operates by defeating the validity of secret "side agreements" reached with previous officers of insolvent depository institutions who have lent themselves to a scheme to mislead federal banking authorities or the public. The second remedy available to the FDIC, 12 U.S.C. § 1823(e), is a legislative device enacted originally in 1950 as part of the Federal Deposit Insurance Act, ch. 967., 64 Stat. 899 (1950). It requires covered agreements to meet four specific criteria as a condition of enforcement against the FDIC.[5]

Both remedies share common objectives, the most prominent being to assist the FDIC in valuing the assets of an insolvent bank accurately in placing the bank under receivership and to prevent fraud by outgoing officials of the failed institu-

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[5] In pertinent part, 12 U.S.C. § 1823(e) provides that:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it . . . as receiver of any insured depository institution, shall be valid . . . unless [it] . . . (1) is in writing, (2) was executed by the depository institution . . . contemporaneously with the acquisition of the asset, (3) was approved by the board of directors or the depository institution or its loan committee, which approval shall be reflected in the minutes . . . and (4) has been, continuously, from the time of its execution, an official record of the depository institution.

tion. *E.g.*, *Gunter v. Hutcheson*, 674 F.2d 862, 865 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

> Both *D'Oench* and § 1823(e) have been applied numerous times to effectuate the public policy interest in not enforcing 'secret agreements' against the FDIC when it is carrying out its statutorily-mandated duties to protect depositors.

Howell v. Continental Credit Corp., 655 F.2d 743, 746 (7th Cir. 1981). In the court of appeals and before the district court, the FDIC based its disavowal of VMC's right to a termination fee under the Amendment to the Whole Loan Sale and Servicing Agreement on both the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e).

B. The *D'Oench, Duhme* Doctrine Was Unavailable On Summary Judgment Here.

Although it attempted to persuade both the district court and the court of appeals otherwise, the FDIC could not seriously rely upon the *D'Oench, Duhme* doctrine to disavow its contractual obligation to pay VMC's termination fee at the summary judgment stage. NBW was a party to the VMC sale transaction, its executives were involved in the negotiations leading to the sale, and its CFO signed all the transactional documents (JA 80-86, 95, 101-02, 103, 106-09, 139-46, 436-37, 441). Moreover, the participation of the FDIC, the OCC, and the FRB in the transaction precluded characterizing it as a secret scheme to mislead banking regulators (A4).

Adjudication of the FDIC's dispositive motion obliged both courts to resolve all genuine issues of fact in VMC's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 249 (1986); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). Presumably for this reason, the opinions of neither the court of appeals nor the district court mention the *D'Oench, Duhme* doctrine. Thus, as mistakenly prosecuted on

summary judgment by the FDIC, this case centered exclusively upon the applicability of 12 U.S.C. § 1823(e) to the sale transaction, even though it is the *D'Oench, Duhme* doctrine which applies generally to agreements with failed banks.

C. The Court Of Appeals Erroneously Departed From Precedent Of The Seventh And Eleventh Circuits In Applying Section 1823(e) To The VMC Sale Transaction.

VMC did not contend that the sale transaction was consummated in a manner which satisfied all the statutory requirements of 12 U.S.C. § 1823(e). Rather, the questions posed to the court of appeals were whether section 1823(e) applied to the transaction and, if so, whether the FDIC was entitled to disavow the transaction yet retain the consideration conveyed to NBW. Without any meaningful discussion, the court's short decision concluded that the Amendment to the Whole Loan Sale and Servicing Agreement was unenforceable because every agreement with a failed bank is subject to the coverage of section 1823(e). (A7). The decision also made no mention of VMC's right to an offset or reduction based upon the value of the consideration transmitted to NBW, despite the fact that that right went uncontested by the FDIC.

The FDIC's position, apparently adopted by the court of appeals, was that 12 U.S.C. § 1823(e) determines the enforceability of every agreement with a failed bank. In adopting this interpretation of the statute, the court committed innumerable errors, among them ignoring the context in which the statute was first enacted and later re-enacted, rendering a decision in conflict with well-reasoned decisions of other courts of appeals and district courts, and inadvertently overruling the *D'Oench, Duhme* doctrine by implication. These errors and others highlighted below warrant the issuance of a writ of certiorari and consideration of these matters by this Court.

Section 1823(e) can only be interpreted properly by bearing in mind that it was originally enacted in 1950, when the business of banks was primarily, if not exclusively, making loans. Thus, although there are any number of cases which contain language stating that section 1823(e) applies to every agreement with a failed bank, they uniformly concern suits on notes and other unilateral obligations. This is so because:

> [T]he purpose of section 1823(e) . . . is to protect the FDIC from hidden agreements that would defeat its interest in what is otherwise a facially valid note . . . The concern is thus with agreements that are not made part of the note.

FDIC v. Hatmaker, 756 F.2d 34, 37 (6th Cir. 1985); *accord Commerce Federal Savings Bank v. FDIC*, 872 F.2d 1240, 1245 (6th Cir. 1989).

Consistent with the overarching legislative aim of targeting secret and unrecorded agreements relating to notes and obligations thereon, since its original enactment, section 1823(e) has been repeatedly invoked to bar defenses in suits to "enforce notes [and guarantees] in accordance with their written terms" in the face of nonpayment by an obligor. *FSLIC v. Hsi*, 657 F. Supp. 1333, 1338 (E.D. La. 1986); *accord FDIC v. Virginia Crossings Partnership*, 909 F.2d 306 (8th Cir. 1990); *FDIC v. Cardinal Oil Well Servicing Co.*, 837 F.2d 1369 (5th Cir. 1988); *FDIC v. de Jesus Velez*, 678 F.2d 371 (lst Cir. 1982); *FDIC v. Gardner*, 606 F. Supp. 1484 (S.D. Miss. 1985).

In the late 1970's and early 1980's, federal bank regulatory agencies first sought to invoke section 1823(e) in contexts other than suits on notes. Routinely, they were rebuffed in the attempt for reasons such as those expressed by the Court of Appeals for the Seventh Circuit after reviewing fourteen recent cases:

> Both *D'Oench* and § 1823(e) have been applied numerous times . . . . In all of these cases, however,

> the FDIC was seeking to enforce a facially valid note or guarantee imposing a unilateral obligation on the maker to pay a sum certain amount to the bank [and] the makers' defenses were founded entirely upon separate and undisclosed agreements.
>
> We believe these holdings are inapplicable, therefore, where the document the FDIC seeks to enforce is one . . . which facially manifests *bilateral* obligations and serves as the basis of the . . . defense.
>
> The defense . . . arises directly and explicitly from the provisions of the [agreements] which were in the bank's files and which the FDIC now seeks to enforce.

Howell, 655 F.2d at 746-47 (emphasis in original); *accord Riverside Park Realty Co. v. FDIC*, 465 F. Supp. 305, 313 (M.D. Tenn. 1978); *see also FDIC v. McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986) (citing *Howell* and *Riverside Park* with approval).

For these same reasons, the Court of Appeals for the Eleventh Circuit has held that: "Section 1823(e) does not apply to every inquiry concerning an asset. It does not apply . . . for breach of bilateral obligations . . . . " *FDIC v. Merchants National Bank*, 725 F.2d 634, 639 (11th Cir. 1969).

The practical fallacy of the expansive interpretation of section 1823(e) urged by the FDIC below was succinctly captured by another district court in litigation involving the Resolution Trust Corporation as receiver:

> If . . . section 1823(e) were to be applied as suggested by the [FDIC], liability on any obligation (except, perhaps, insured deposits) not meeting the section 1823(e) requirements could be avoided . . . . Would the [FDIC] have boards of directors operating en banc as tellers, approving and contemporaneously record-

> ing each and every bank transaction, in order for these transactions to be excepted from . . . § 1823(e).

Agri Export Cooperative v. Universal Savings Ass'n and RTC, 767 F. Supp. 824, 833-34 (S.D. Tex. 1991). On the same rationale, the district court responsible for the affirmative litigation against the FDIC as receiver for NBW rejected its all encompassing interpretation of the statute. *In Re: NBW* (G1). The court of appeals' departure from the precedent of these courts was unfounded and ill-conceived.

D. The Decision Below Renders The *D'Oench, Duhme* Doctrine Superfluous, Ignores Significant Intervening Precedent, And Fails To Provide For An Appropriate Offset.

The decision of the court of appeals here was not only devoid of thoughtful analysis, it rendered superfluous the *D'Oench, Duhme* doctrine. That doctrine, as described above, renders unenforceable all secret and potentially deceptive side agreements reached with the principals of a failed depository institution. 315 U.S. 447. If, however, the requirements of section 1823(e) were applied to agreements of every nature and not just to notes, guarantees, and similar unilateral obligations, the *D'Oench, Duhme* doctrine would be negated in its entirety. This is so because every agreement satisfying the requirements of section 1823(e) would, *ipso facto*, pass muster under the *D'Oench, Duhme* doctrine as well. *See McClanahan*, 795 F.2d at 514, n.1 ("It has not been suggested that the enactment of § 1823 in 1950 . . . preempted the common law rule of *D'Oench, Duhme*.").

The decision below was also in error because it failed to appreciate the significance of the intervening issuance of the decisions in *Howell* and *Merchants National Bank* between the original enactment of 12 U.S.C. § 1823(e) in 1950 and its re-enactment in 1989 as part of FIRREA. In expansively interpreting the statute, the court of appeals below failed to appreciate

that when Congress re-enacted section 1823(e), "the normal rule of statutory construction" mandated continued application of the statute in accordance with previous precedent. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986).

Finally, in concluding this proceeding without giving VMC a credit or an offset against the damages sought by the FDIC, the court of appeals did far more than allow the FDIC to invoke 12 U.S.C. § 1823(e) to disavow VMC's contractual rights under the Amendment to the Whole Loan Sale and Servicing Agreement. The court of appeals also permitted the FDIC to retain the benefits of the sale. In other cases, when the FDIC invoked the statute to render an agreement unenforceable, it nonetheless "concedes that [the obligor] is entitled to credit" for "the value" of the consideration which the FDIC retains. *FDIC v. Manatt*, 688 F. Supp. 1327, 1323 (E.D. Ark. 1988), *aff'd*, 922 F.2d 486 (8th Cir.), *cert. denied*, 111 S.Ct. 2889 (1991). After conducting a hearing, "the court [should have] required the FDIC to give [VMC] an additional credit" for the value the FDIC obtained. *Id.*, 922 F.2d at 488.

In the VMC sale transaction, NBW received at least $3.6 million in cash from VMC, $1.1 million in cash from WBC from the proceeds of sale, and relief from the liability of a sizeable nonperforming loan (A4). The FDIC itself acknowledged that NBW did in fact receive consideration from VMC substantially in excess of the amount that the FDIC sought in its complaint (JA 237-38) and never disputed VMC's right to an offset or credit against the judgment. In allowing this case to end as it did, the court of appeals not only expanded the application of section 1823(e) beyond that allowed by other circuits, it awarded the FDIC greater relief than it sought.

E. The Amendment To The Whole Loan Sale And Servicing Agreement Was One Element Of The VMC Sale Transaction Which Could Not Alone Be Disavowed By The FDIC.

Lacking as it did thorough analysis, the basis of the decision of the court of appeals is difficult to discern. In one very short phrase, the court suggested that VMC's right to a termination fee was unenforceable because NBW did not execute the Amendment to the Whole Loan Sale and Servicing Agreement (A7). This facile statement could not provide a legitimate basis for the court to avoid the difficult issues before it.

VMC's right to a termination fee, although codified in the Amendment to the Whole Loan Sale and Servicing Agreement, was an element of the larger integrated transaction by which VMC was sold and substantial benefit conveyed upon NBW. The court of appeals acknowledged this as fact (A4). Indeed, in the undisputed words of VMC's president:

> Each of the four documents [embodying the sale of VMC] constituted a component of the [VMC] sale transaction. None of the documents would have been entered into as an independent contract. Each document was entered into as a component part of the whole transaction.

(JA 425-26). These facts, when viewed through the prism of the standards applicable on summary judgment, obligated the court of appeals to conclude that there was only one "agreement" of which the Amendment was but a part. *E.g., Anderson*, 477 U.S. 249.

The existence of multi-party, multi-document contracts has long been recognized. A single contract exists even though its terms may be contained in a number of documents, when all documents are not signed by all parties, or if all are not executed

at the same time. "A contract may be contained in several instruments." *D.H. Pritchard, Contractor, Inc. v. Nelson*, 147 F.2d 939, 942 (4th Cir. 1945). "This rule obtains even when the parties are not the same, if the several contracts were known to all the parties." *Id.* It is true "even if . . . [the component documents] were executed on different dates and were not among all of the same parties, they will constitute a single contract as long as they involve the same subject matter and prove to be parts of an entire transaction." *Hampton Roads Shipping Association v. International Longshoremen's Association*, 597 F. Supp. 709, 716 (E.D. Va.), *remanded on other grounds*, 746 F.2d 1015, *cert. denied*, 471 U.S. 1017 and 471 U.S. 1102 (1984).

It is not essential that the documents refer to one another within their respective texts. "Failure, even studious failure, in one contract to refer to the other cannot be controlling." *Helvering v. Le Gierse*, 312 U.S. 531, 540 (1941). Rather, "contracts must be considered together" where to "say they are distinct transactions is to ignore actuality . . . ." *Id.* In situations such as these, the respective documents constituting the contract "should be interpreted together, each one assisting and determining the meaning intended to be expressed by the others." *Wellmore Coal Company v. Powell Construction Co.*, 600 F. Supp. 1042, 1046 (W.D.Va. 1984) (citing *J.M. Turner & Co. v. Delaney*, 211 Va. 168, 176 S.E.2d 422 (1970)); *accord Trans-Bay Engineers & Builders, Inc. v. Hills*, 551 F.2d 370 (D.C. Cir. 1976); *Friedman v. Manfuso*, 620 F. Supp. 109, 117 (D.D.C. 1985).

This was precisely the situation present here. The parties to the sale of VMC codified their transaction in four documents (JA 421, 423-26, 428-29). Moreover, one of the parties who signed all four documents served as CFO of both WBC and NBW (JA 59-79, 110-19, 120-23, 185-86). And significantly, one of the sale documents specifically referred to NBW's ex-

ecution of the Amendment to the Whole Loan Sale and and Servicing Agreement (JA 185-86). Consequently, on summary judgment, the existence of a contract executed by NBW could not be genuinely disputed and the actions of the FDIC in disavowing one portion of that contract and retaining the benefits it received under the remainder of the transaction affirmed.

III. VMC Was Entitled To Raise Equitable Defenses To The FDIC's Right To Recover Even Assuming That Section 1823(e) Applied.

VMC defended this action on the alternative ground that even were 12 U.S.C. § 1823(e) to apply to the transaction in question, it enjoyed two equitable defenses against the FDIC's recovery of the termination fee — unjust enrichment and equitable estoppel. Both are recognized as valid causes of action or defenses in suits involving the federal government. The opinion of the court of appeals was silent on the viability of VMC's defenses and, once again, we are left to speculate as to the basis of its opinion. Presumably, the court was persuaded by the FDIC's argument that this Court's decision in *Langley v. FDIC* precluded all equitable defenses to any action governed by section 1823(e). Whatever its reasoning for failing to consider VMC's defenses, the court of appeals erred and departed from its own precedent, that of three other circuits, and this Court as well.

The imposition of a constructive trust is a well-recognized equitable remedy routinely imposed by courts to prevent the federal government from being unjustly enriched by retaining funds in its possession upon assuming control over and repudiating the contractual obligations of a regulated entity that has become insolvent. *Spring Construction Co., Inc. v. Harris*, 562 F.2d 933 (4th Cir. 1977). "A court of equity has the power . . . to avoid unjust enrichment" by the federal government when it

succeeds to the interests of an insolvent regulated entity. *Trans-Bay Engineers and Builders*, 551 F.2d at 382.

Such a remedy is appropriate where the federal government "had encouraged" the party seeking recovery to do business with the now insolvent entity. *Van-Tex, Inc. v. Pierce*, 703 F.2d 891, 898 (5th Cir. 1983). It is available when the federal government assumes the position of an insolvent regulated entity and has "been enriched and unjustly so, such as when [it retains] requested goods or services without paying any compensation therefore." *S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 39 (2nd Cir. 1979). This remedy has been acknowledged as appropriate when the affairs of an insolvent bank are being concluded by regulatory agencies serving as receivers. *Leonard v. Gage*, 94 F.2d 19, 23 (4th Cir.), *cert. denied*, 303 U.S. 653 (1938).

The opinions of this Court also "have continued to mention" that the doctrine of equitable estoppel is available as a defense to an action brought by the government. *OPM v. Richmond*, 496 U.S. 414 (1990).

> [W]e are hesitant . . . to say that there are *no cases* in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.

Heckler, 467 U.S. at 61-62 (emphasis in original).

Decisions of the courts of appeals confirm that the defensive use of equitable estoppel is available against the federal government. *E.g., Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989) (*en banc*), *cert. denied*, 498 U.S. 957 (1990); *USA Petroleum Corp. v. United States*, 821 F.2d 622 (Fed. Cir. 1987). In the words of the Eleventh Circuit: "We see no reason not to apply the traditional rules of equitable estoppel to the conduct

of the FDIC . . . . FDIC should be required to deal fairly with its debtors and should be held accountable for the representations of its agents." *FDIC v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984).

There is no doubt that VMC made the showings required to establish both of its equitable defenses. All three federal banking regulatory agencies with jurisdiction over the affairs of NBW were aware of its precarious financial state at the time of the VMC sale transaction. All, including the FDIC, knew of and encouraged the consummation of that sale so that NBW's chances for survival would be enhanced by an infusion of assets and a release of liabilities (JA 419-20, 426, 443, 444). The court of appeals itself recognized that the "transaction . . . was overseen . . . by officials from the FDIC, the Federal Reserve Board, and the Office of the Comptroller of the Currency" (A4). And prior to issuing its letter of non-objection, the FDIC specifically required NBW to identify the consideration it was receiving and to verify that NBW's Board of Directors had reviewed the sale transaction and found it in the best interests of NBW (JA 95-99, 101-02).

The statements of VMC's Executive Vice President undeniably confirmed the importance of the government's participation in this transaction:

> Had the government not led WMA and . . . [VMC] to believe that the regulatory agencies — including the FDIC — would abide by the terms of the sale agreement in the event of the insolvency of a party, the . . . [VMC] sale transaction would never have been consummated.

(JA 442, 444). Contrary to these representations, the FDIC declared NBW insolvent almost immediately after NBW received the consideration for VMC's sale (A4). The FDIC then repudiated the terms of the transaction while retaining the substantial benefits the transaction generated for NBW (A4-5).

This course of conduct fully supported VMC's defenses of equitable estoppel and unjust enrichment.

The only response offered by the FDIC to this course of conduct was the argument that this Court's decision in *Langley v. FDIC* precluded all equitable defenses to actions governed by 12 U.S.C. § 1823(e). But *Langley* holds only that fraud by outgoing officers of a failed bank and knowledge of the agreement in question obtained by the FDIC in commencing receivership provide no substitute for satisfaction of the requirements of the statute. 484 U.S. at 94-95. Nothing in that decision, much less in any other case, licenses inequitable conduct by the FDIC and its sister regulatory agencies and entitles them to retain the benefits of transactions which they have disavowed. In not considering VMC's defenses to the FDIC's Complaint, the Fourth Circuit again erred and departed from better reasoned precedent.

IV. The Separate Adjudication Of VMC's Counterclaim And The FDIC's Complaint Was Both Erroneous And Prejudicial.

Arising as it did out of the same transaction and course of events as the FDIC's Complaint, VMC's Counterclaim in unjust enrichment and breach of contract was mandatory in nature and its joinder with VMC's Answer compulsory. Rule 13(a), Fed. R. Civ. P. After replying to the Counterclaim, the FDIC moved to dismiss pending VMC's exhaustion of FIRREA's administrative remedies, 12 U.S.C. § 1821(d)(6). VMC opposed on the ground that resort to the administrative process would be futile. *Mathews v. Eldridge*, 424 U.S. 319, 326-30 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 756-67 (1975); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 703 (D.C. Cir. 1975).

VMC also argued that if it were required to proceed administratively, then consideration of the FDIC's Complaint should be postponed because its prior adjudication would in-

evitably bar VMC in the subsequent pursuit of its Counterclaim by application of the doctrines of *res judicata* and collateral estoppel. *See Taylor v. Rederi A/S Volo*, 374 F.2d 545, 550 (3rd Cir. 1967) ("in light of the fact that plaintiff's original claim and defendant's [counter] claim are intertwined factually, it is better that they be '[t]ried and determined as a whole' and not be considered 'by a kind of shadow boxing in vacuo.'") (quoting *Paul E. Hawkinson Co. v. Dennis*, 166 F.2d 61, 63 (5th Cir. 1948)).

The district court entered an order dismissing VMC's Counterclaim without prejudice on November 1, 1991, after the FDIC's representative assured the court that doing so would not prejudice VMC and that both parties' claims could be adjudicated together (F5). Contemporaneously with the entry of that Order, VMC filed an administrative claim with the FDIC (JA 227). Before it decided that claim, the FDIC moved for and was granted summary judgment (B2). When VMC later exercised its right to judicial review of its Counterclaim, the FDIC successfully interposed *res judicata* and collateral estoppel as bars to its further prosecution (B4).

In reviewing this course of events, the court of appeals upheld the dismissal of VMC's Counterclaim on the ground that it "had failed to show actual futility" because the FDIC had not "made clear that it would not rule favorably on VMC's claim in an administrative proceeding" (A9). The court's holding on this aspect of the case was inexplicable since by that time the FDIC had already successfully interposed the defenses of *res judicata* and collateral estoppel to VMC's affirmative litigation (D4). Thus, resort to the administrative process by VMC was surely a futile exercise.

The correct course for the court of appeals was to reverse the finality of the judgment entered by the district court and either relieve VMC of the obligation of proceeding administratively or stay entry of judgment on the FDIC's Complaint

pending completion of the administrative process. *See Bank of New England, N.A. v. Callahan*, 758 F. Supp. 61 (D.N.H. 1991) (staying judicial proceedings pending exhaustion of administrative proceedings for claims against failed banks); *Connecticut Bank & Trust Co. v. CT Partners, Inc.*, 136 F.R.D. 347 (D. Conn. 1991). The fact that the parties' claims here proceeded on two tracks greatly prejudiced VMC.

Had litigation on the FDIC's Complaint not gone forward separately pending VMC's pursuit of the administrative process, the outcome of this case would have been entirely different. By that time, the district court presiding over the affirmative litigation against the FDIC as receiver for NBW had already ruled that 12 U.S.C. § 1823(e) did not apply outside the context of suits on promissory notes and loan transactions. It held:

> The language of the statute suggests that Congress was referring to traditional loan transactions; subsection (3) specifically refers to the loan committee and the other subsections describe a process that might be followed in the course of making a normal loan. The writing requirements, which are stringent, will almost never be satisfied by investors . . . . There is no hint in any of Congress' pronouncements that such individuals should be disfavored.
>
> * * * * *
>
> [T]he word 'asset' has a particular meaning and is not simply a stand-in for 'money' . . . . Thus, it is appropriate that 'asset' [includes promissory notes and] should also refer to loan participation agreements, promises to make future loans, and sales of property or securities which involve the making of a note from an individual or entity to the bank. . . . *Under no circumstances, however, should the term be interpreted so broadly as to encompass any liability or*

> *other existing conditions which affects the financial condition of the receivership.*

In Re: NBW (G26-27) (emphasis supplied).

Thus, had not the court of appeals erroneously affirmed the district court's precipitous and separate adjudication of the FDIC's Complaint, the outcome would have been diametrically different. VMC would have prevailed through the affirmative application of the doctrine of collateral estoppel. Indeed, given the conduct of the FDIC and its sister agencies here, this was the only just resolution of this case, whether reached through correct application of section 1823(e), proper consideration of VMC's equitable defenses, or contemporaneous adjudication of both parties' claims.

CONCLUSION

For the foregoing reasons, petitioner Vienna Mortgage Corporation respectfully requests that the Court issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(Counsel Of Record)
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Counsel for Petitioner
Vienna Mortgage Corporation

Date: May 26, 1993

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for The National Bank of Washington,
Plaintiff-Appellee,

v.

VIENNA MORTGAGE CORPORATION,
Defendant-Appellant,

MORTGAGE BANKERS ASSOCIATION OF AMERICA,
Amicus Curiae.

NO. 92-1091

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for The National Bank of Washington,
Plaintiff-Appellee,

v.

VIENNA MORTGAGE CORPORATION,
Defendant-Appellant,

MORTGAGE BANKERS ASSOCIATION OF AMERICA,
Amicus Curiae.

NO. 92-1092

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-91-1042-A)

Argued: October 28, 1992
Decided: February 5,1993

Before SPROUSE and CHAPMAN, Senior Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Charles Seldon, KROOTH & ALTMAN, Washington, D.C., for Appellant. Dennis Sanford Klein, HUGHES, HUBBARD & REED, Washington, D.C., for Appellee. **ON BRIEF:** Joseph A. Kijewski, KROOTH & ALTMAN, Washington, D.C., for Appellant Steven T. Corliss, M. Kathleen O'Connor, HUGHES, HUBBARD & REED, Washington, D.C.; Ann S. DuRoss, Assistant General Counsel, Colleen B. Bombardier, Senior Counsel, Robert D. McGillicuddy, Deputy Senior Counsel, Michelle Kosse, FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C., for Appellee. Kenneth Labowitz, YOUNG, GOLDMAN & VAN BEEK, Alexandria, Virginia, for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Vienna Mortgage Corporation (VMC) appeals the grant of summary judgment in favor of the Federal Deposit Insurance Corporation (FDIC), and the dismissal of VMC's counterclaim under Rule 12(b)(1) Fed. R. Civ. P. FDIC brought this action to recover monies due under a mortgage service contract, which was made between the Washington Mortgage Group, for whom VMC is now the successor in interest, and the, now insolvent, National Bank of Washington (NBW), for whom FDIC is acting as receiver. VMC claims that it is entitled to the monies it

retained under a termination penalty agreement, executed as an amendment to the contract. VMC also counterclaimed for Breach of Contract and Unjust Enrichment. The district court dismissed VMC's counterclaim, pursuant to Rule 12(b)(1) Fed. R. Civ. P., finding that VMC had not exhausted its administrative appeals. The district court granted FDIC's motion for summary judgement on its claim, finding that the penalty amendment was not enforceable against FDIC under 12 U.S.C. § 1823(e), and therefore VMC could not retain the termination fee. We affirm.

I.

NBW and VMC (previously known as the Washington Mortgage Group) were both subsidiaries of Washington Ban-Corporation ("WBC"), a Delaware bank holding corporation. On April 7, 1988 they executed a Whole Loan Sale and Servicing Agreement ("Agreement"), under which VMC agreed to make real estate mortgage loans, sell them to NBW and continue to service the loans in return for a certain percentage of the receipts as a fee. The Agreement was signed by the vice-presidents of both VMC and NBW.

Under the Agreement NBW had the right to terminate without cause upon 30 days notice. The Agreement provided:

> Upon termination of this Agreement, [VMC] will account for and turn over to [NBW] all funds collected under each Mortgage, less only the compensation then due [VMC], and deliver to [NBW] all records and documents relating to each such Mortgage as described herein that it may have in its possession.

This Agreement had a standard merger clause which stated, in part, "[t]his document contains the entire agreement between the parties hereto and cannot be modified in any respect except by an amendment in writing signed by both parties."

From April 1988 until November 1990 VMC executed its duties under this contract with NBW, servicing the mortgages, and collecting and remitting the funds to NBW.

In Spring 1990, the parent company, WBC, decided to sell its wholly-owned subsidiary, VMC, to Washington Mortgage Acquisition, Inc. ("WMA"). The transaction was effected through the execution of four separate documents, and was overseen by officers of WBC, NBW, VMC, and WMA, and also by officials from FDIC, the Federal Reserve Board, and the Office of the Comptroller of the Currency.

One of the documents, executed on June 29, 1990, was entitled Amendment To Whole Loan Sale And Servicing Agreement ("Amendment"). It purported to amend the original contract between NBW and VMC, and called for the payment of a termination fee by "Purchaser" if it terminated the service arrangement with the "Seller" without cause.

"Seller" was identified as WMG (now VMC) in both the Agreement and the Amendment. In the original Agreement "Purchaser" was identified as NBW. But in the Amendment WBC (the parent of NBW) "and its subsidiaries" were defined "collectively" as "Purchaser." The Amendment was only signed by officers of VMC and WBC, the parent company.

The sale of VMC to WMA was also memorialized by a Stock Purchase and Investment Agreement; a Loan Servicing Transfer Agreement; and a Loan Sale Agreement. The final documents were executed on June 29, 1990.

NBW derived certain benefits from the sale of VMC: first, it was relieved of certain financial obligations, and second, VMC was obliged to pay NBW $3.5 million and to assume certain nonconforming loans.

In August 1990 FDIC declared NBW insolvent, and took control as its receiver. In a letter of October 25, 1990, FDIC gave notice to VMC of its termination, on behalf of NBW, of the 1988

mortgage service contract. The letter stated the termination would be effective 30 days from its receipt. No cause was specified in the letter.

VMC returned to FDIC some of the funds collected on behalf of NBW, but retained $770,105.45, an amount it calculated to be the termination fee under the formula set forth in the Amendment of June 29, 1990.

FDIC, claiming that it is not bound by the Amendment, filed actions for conversion, breach of contract and breach of fiduciary duty against VMC in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. VMC counterclaimed for breach of contract and unjust enrichment.

II.

This appeal presents three issues: first, whether VMC raised a genuine issue of material fact as to the Amendment's enforceability against FDIC under 12 U.S.C. § 1823(e)(West 1989);[1] second, whether the district court lacked subject matter jurisdiction over VMC's counterclaim because VMC had failed to exhaust its administrative remedies pursuant to the requirement of § 1821(d)(13)(D); and third, whether the district court abused its discretion in awarding prejudgment interest.

A.

When the creditor of a depository institution in insolvency seeks to recover under an agreement alleged to have been executed with the insolvent institution, such agreement must comply with the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1823(e). *Carteret Sav. Bank, F.A. v. Compton, Luther & Sons*, 899 F.2d 340 (4th Cir. 1990). Among other things, FIRREA provides a scheme through which FDIC, as receiver, is protected against

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[1] Hereinafter, Unless otherwise noted, all statutory citations refer to sections within Title 12 U.S.C. (West 1989).

secret agreements between the insolvent institution and certain claimants. Section 1823(e) states:

> (e) Agreements against the interests of Corporation
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (West 1989).

In *Carteret* this Court noted that the preceding code section was a codification of language which had long controlled claims and defenses against FDIC as receiver. 899 F.2d at 343.

In this case VMC claims there is factual dispute as to whether the Amendment satisfies § 1823(e) and is thereby binding. It argues the issue is therefore inappropriate for summary judgment.

In a terse order, issued December 20, 1991, the district court held that the Amendment failed to satisfy the elements of § 1823(e) and that the Amendment could not be enforced against FDIC.

In its consideration of § 1823(a) the Supreme Court has held, "[t]he short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails.... [A]n agreement that does not meet them fails...." *Langley v. FDIC*, 484 U.S. 86, 95 (1987). Other circuits have explicitly held that each of the four criteria in § 1823(e) must be satisfied for an agreement to be valid against FDIC. In *Resolution Trust Corporation v. McCrory* the Fifth Circuit held that § 1823(e) "forbids defenses based on an agreement with a failed depository institution unless the agreement meets all four criteria enumerated in [that provision]." 951 F.2d 68 (5th Cir. 1992). Similarly, the Seventh Circuit has held that a claimant must meet each of the requirements. "Failure to satisfy one of the requirements of § 1823(e) is fatal to any agreement covered by that section." *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991).

This is not a case in which a contract may be inferred from extrinsic evidence. The language of § 1823(e) clearly says "*no* agreement... shall be valid" against the receiver unless it satisfies each of the enumerated elements. We agree with the views of the Fifth and Seventh circuits. We affirm the district court and hold that the Amendment was an agreement which diminished the value, to FDIC, of the larger contract, which contract was an "asset" within the meaning of § 1823(e). The Amendment was not executed by NBW, it was not approved by the NBW Board of Directors, and no approval appeared in the minutes of the Board, and it thereby failed to pass muster under § 1823(e)(3).

The district court correctly determined that the failure of VMC to present evidence to establish these essential elements was fatal to its defense against FDIC's claim for recovery, and summary judgment on its claim was appropriate.

B.

When a depository institution insured by FDIC becomes insolvent and is liquidated, FDIC may become the receiver for that financial institution pursuant to § 1821(c).[2] Under § 1821(d)(3) FDIC is authorized to decide claims filed by creditors of the insolvent institution.[3]

At the hearing on the motion to dismiss the VMC counterclaim the district court stated its reasoning and ruled

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[2] Appointment of Corporation as conservator or receiver

(1) In general

Notwithstanding any other provision of Federal law, the law of any State, or the constitution of any State, the Corporation may accept appointment and act as conservator or receiver for any insured depository institution upon appointment in the manner provided in paragraph (2) or (3).

(2) Federal depository institutions

(A) Appointment

. . . .

(ii) Receiver

The Corporation shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution or District bank by the appropriate Federal banking agency, notwithstanding any other provision of Federal law (other than section 1441a of this title) or the code of law for the District of Columbia

12 U.S.C.A. § 1821(1)-(2)(A) (West 1989).

[3] (3) Authority of receiver to determine claims

(A) In general

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4)(A).

from the bench that § 1821(d)(13)(D)[4] required that the claims procedure set forth under § 1821(d)(3) et seq. be exhausted prior to judicial review and that such procedure had not been exhausted. The court found that it lacked subject matter jurisdiction over the counterclaim until the administrative route had been completed.

"It is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Darby v. Kemp*, 957 F.2d 145, 147 (4th Cir. 1992). Adherence to this doctrine properly employs the specific expertise of the controlling agency, promotes efficiency and provides the courts with a "fully developed administrative record." *Id.*

VMC concedes that it has not exhausted its administrative remedies, but argues that it should be excused under the futility exception to the exhaustion doctrine. This exception is acknowledged in *Darby*. 957 F.2d at 147. VMC contends that, as FDIC has challenged the right of VMC to collect on its Counterclaim, and has filed this lawsuit, FDIC has made clear that it would not rule favorably on VMC's claim in an administrative proceeding. Therefore, VMC claims it would be futile to pursue its claim administratively.

In addressing this issue the district court looked to *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3rd Cir. 1991), a case

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[4] (D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

resolved under FIRREA, which discusses the argument that a claimant should be excused from the exhaustion requirement because of futility. *Rosa*, 938 F.2d at 395. The claimants in *Rosa* asserted that since the Resolution Trust Corporation ("RTC"), the receiver in that case, had already opposed their claim it would be futile to seek administrative remedies. *Id.* The court rejected this argument saying the RTC's legal position in the district court litigation was "not necessarily conclusive of the receiver's determination of [claimants'] claims." *Id.* The court stated, "[i]f RTC as receiver were to allow and satisfy [claimants'] claims in whole or in part, the dispute now before this court would be moot to that extent." *Id.*

The district court concluded that, like the creditors in *Rosa*, VMC had failed to show actual futility. We agree and we affirm the decision of the district court to dismiss VMC's Counterclaim for lack of subject matter jurisdiction.

C.

Finally, VMC argues that the district court abused its discretion in awarding prejudgment interest to FDIC.

The decision to award prejudgment interest is in the discretion of the trial court Va. Code Ann. § 8.1-382 (Michie 1984 & Supp. 1991). Such an award may not be disturbed on appeal except upon a finding of abuse of discretion. *Cotter v. Eastern Conf. of Teamsters Retirement Plan*, 898 F.2d 424, 429 (4th Cir. 1990). Furthermore "prejudgment interest is particularly appropriate where, as here, there is no dispute as to the amount of damages to which the plaintiff is entitled." *Id.* The amount withheld was $770,105.45, VMC has had use of these funds throughout the dispute, and the sum in question was a liquidated amount due to NBW on November 29, 1990.

We hold that the district court did not abuse its discretion in awarding to FDIC prejudgment interest.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for The National Bank of Washington,
Plaintiff,

v.

WASHINGTON MORTGAGE GROUP, INC.
Defendant.

Civil No. 91-1042-A

ORDER

This matter comes before the Court on plaintiff's Motion to Dismiss defendant's Counterclaim, pursuant to 12 U.S.C. § 1821(d) and Rule 12(b)(1), Fed. R. Civ. P., based upon defendant's failure to exhaust the appropriate administrative procedures.

For the reasons stated from the bench, the Court **GRANTS** plaintiff's motion to dismiss defendant's counterclaim.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
November 1, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for The National Bank of Washington,
Plaintiff,

v.

WASHINGTON MORTGAGE GROUP, INC.,
Defendant.

CIVIL ACTION NO. 91-1042-A

ORDER

The court finding that the June 29, 1990 amendment to the Servicing Agreement, pursuant to which the defendant is retaining $770,105.00 as a termination fee, is an agreement within the meaning of 12 U.S.C. § 1823(e), and that the agreement is not valid against the plaintiff because the provisions of 12 U.S.C. § 1823(e) were not complied with, it is hereby

ORDERED that the motion of the plaintiff for summary judgment is granted and judgment is awarded in favor of the plaintiff Federal Deposit Insurance Corporation as Receiver for the National Bank of Washington, against the defendant Washington Mortgage Group, Inc., in the amount of $770,105.00, plus costs.

/s/_____
United States District Judge

Alexandria, Virginia
December 20th, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for The National Bank of Washington,
Plaintiff,

v.

WASHINGTON MORTGAGE GROUP, INC.,
Defendant.

CIVIL ACTION NO. 91-1042-A

ORDER

Upon consideration of the motion of the plaintiff to amend the judgment of December 20, 1991, to provide for prejudgment interest at 9% from November 29, 1990, it is, for the reasons stated from the bench, hereby

ORDERED that the judgment of December 20, 1991 is amended to provide that it shall bear prejudgment interest from November 29, 1990, at the rate of 9%, and after December 20, 1991 at the judgment rate.

/s/_____
United States District Judge

Alexandria, Virginia
January 10th, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for the National Bank of Washington,
Plaintiff,

v.

VIENNA MORTGAGE CORPORATION
Defendant.

Civil No. 91-1042-A

ORDER

This matter comes before the Court on defendant's motion, pursuant to Rule 60(b), Fed. R. Civ. P., for relief from final judgment.

For the reasons stated from the bench, the motion is **DENIED.**

The Clerk is directed to send copies of this Order to all counsel of record.

/s/
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
October 14, 1992

C1

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 2, 1993

No. 92-1091
CA-91-1042-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for The National Bank of Washington
Plaintiff-Appellee

v.

VIENNA MORTGAGE CORPORATION
Defendant-Appellant

MORTGAGE BANKERS ASSOCIATION OF AMERICA
Amicus Curiae

No. 92-1092
CA-91-1042-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
as receiver for The National Bank of Washington
Plaintiff-Appellee

v.

VIENNA MORTGAGE CORPORATION
Defendant-Appellant

MORTGAGE BANKERS ASSOCIATION OF AMERICA
Amicus Curiae

On Petition for Rehearing
with Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES COURT HOUSE ANNEX
1100 EAST MAIN STREET
RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE:
(804) 771-2213

March 2, 1993

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Washington, DC 20005

Re: 92-1091 FDIC v. Vienna Mortgage Corp
CA-91-1042-A
92-1092 FDIC v. Vienna Mortgage Corp

Dear Counsel:

Enclosed is a copy of an order filed 3/2/93, denying the petition for rehearing and suggestion for rehearing in banc in this case.

Yours truly,

BERT M. MONTAGUE
Clerk

By: /s/ Amy M. Church
Deputy Clerk

Enclosure(s)

cc: Doris R. Casey

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 9, 1993

No. 92-1091
CA-91-1042-A

FDIC v. Vienna Mortgage Corp

No. 92-1092

FDIC v. Vienna Mortgage Corp

MANDATE

The judgment of this Court dated 2/5/93 takes effect today.

BERT M. MONTAGUE
CLERK

Krooth & Altman
2101 L Street, N.W.
Washington, D.C. 20037-1584
Telephone: (202) 293-8200 Telecopier: (202) 872-0145

October 14, 1992

VIA OVERNIGHT MAIL

Clerk
United States Court of Appeals
for the Fourth Circuit
Tenth & Main Streets
Richmond, Virginia 23219

Re: Federal Deposit Insurance Corporation v. Vienna Mortgage Corporation, Nos. 92-1091, 1092

Dear Sir or Madam:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, appellant wishes to bring the following matter to the Court's attention. This matter is relevant to the Court's consideration of Argument V (pages 39-46) in appellant's opening Brief and to argument II (pages 10-14) and argument IV (pages 18-19) in appellant's Reply Brief.

On June 22, 1992, appellant re-filed its complaint against the FDIC, as receiver for the National Bank of Washington, in the U.S. District Court for the District of Columbia. *Vienna Mortgage Corporation v. Federal Deposit Insurance Corporation*, Civil Action No. 92-1467 (NHJ). On August 13, 1992, the FDIC moved to dismiss that action. Its motion rested, in great part, upon the argument that the doctrines of collateral estoppel and *res judicata* precluded this affirmative litigation by virtue of the District Court's adjudication of the FDIC's motion for summary judgment in this action.

After obtaining a continuance from the D.C. District Court, appellant moved the District Court for the Eastern District of Virginia to modify the judgment in this action, pursuant to Rule 60(b), Fed. R. Civ. P. Specifically, appellant moved the Court to suspend the finality of its judgment pending litigation of appellant's affirmative claim. In the alternative, appellant moved the District Court to clarify the order which had dismissed appellant's counter-claim to state specifically that litigation of appellant's affirmative action was neither barred nor affected by the earlier judgment in this action. On October 9, 1992, this motion was denied.

The District Court, which directed the parties to apprise this Court of the foregoing proceeding, has advised us that a written order denying appellant's Rule 60(b) motion will be issued shortly. As soon as appellant receives that order, a copy will be transmitted to this Court. In addition, appellant has ordered the transcript of the hearing on the foregoing matter (including the ruling from the bench) and will file a copy with the Court as soon as one is prepared. Upon direction from the Court, appellant will file any further portions of the record of this matter which the Court wishes it to make available.

Thank you for your attention to this matter.

Respectfully,

KROOTH & ALTMAN

/s/ _____
Robert C. Seldon
Counsel for Appellant
Vienna Mortgage Corporation

RCS:sew

cc: Dennis S. Klein, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDERAL DEPOSIT INSURANCE CORP.,
Plaintiff,

versus,

VIENNA MORTGAGE CORP.,
Defendant.

CIVIL ACTION NO. 91-1042-A

Alexandria, Virginia
Friday, October 9, 1992

The above-entitled action came on to be heard before the Honorable T.S. Ellis, III, a Judge for the United States District Court for the Eastern District of Virginia, in Courtroom I, 200 South Washington Street, Alexandria, Virginia 22314, beginning at 4:05 o'clock p.m.

APPEARANCES:

For the Plaintiff:

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KATHLEEN O'CONNOR, ESQUIRE
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For the Defendant:

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Washington, D.C. 20033

* * *

THE COURT: No. The matter is before the Court on a motion to correct the judgement under Rule 60(b). The correction sought is in effect the reinstatement of a counterclaim that was previously dismissed for lack of subject matter jurisdiction in that it had not been administratively exhausted as required by — what section was it? Was it FIRREA?

MR. CORLISS: It's 12 U.S. Code 1821(d) (13) (d).

THE COURT: The colloquy that took place reflects clearly what the Court recalls, namely, the Court anticipated that the matter would return here for trial if the administrative claim did not succeed — that the case would proceed in that fashion. In fact, soon after the Court dismissed the counterclaim, the main claim was disposed by way of summary judgement. The matter was raised to the judge at that time, that is, the existence of the dismissed counterclaim and the representations. In any event, summary judgement was entered.

And now the FDIC is taking the position in the D.C. court in substantial respects different from the representation made here that it really was the same ball of wax and it was in effect not separable and disposed of.

So what we have is a statement by counsel that the client has disavowed and caused other counsel to take an opposite position. And I can certainly understand the movant's concern about that. The Court would be very concerned, too, if the Court thought there was any real duplicity involved or any real effort on the part of counsel to induce the Court to take a certain action on the basis of a representation that the counsel intended to disavow at the next convenient opportunity. That is not, in the Court's view, what occurred.

I don't like the term mere musings because it devalues these exchanges which are terribly important in most instances for the resolution of disputes and motions. And if Mr. Klein thinks that

what he said didn't make any difference, he's seriously mistaken. If I thought for one minute that he was making representations to the Court in a fashion intended to induce the Court but knowingly intending to take another position at another time, I would have his hide on this Courthouse wall staked out. That would be impermissible behavior, destructive of the process that we follow in our adversary proceedings in which courts rely on what counsel say. But I don't think that is what happened. And while mere musings isn't it, it's not a long way from that.

The fact of the matter is — and the motion must be denied because it wasn't really material to the Court's ruling on the counterclaim. The court would have had to have dismissed the counterclaim under the provision of FIRREA no matter what the answer had been.

Now, this Court didn't rule on the summary judgment, so I don't know what it might have done on the summary judgment. And this matter is still before the Fourth Circuit.

Has the matter been fully briefed?

MR. CORLISS: Yes, sir.

THE COURT: Well, I would assume that all of this has been brought to the attention of the Fourth Circuit, including what has been argued here today. In any event, the Fourth Circuit should be apprised by some sort of appropriate method prescribed by the rules that a motion for Rule 60(b) was filed here, that it was argued, and that it was denied. The Fourth Circuit should be apprised of all of this.

I thank counsel for their cooperation.

MR. CORLISS: Thank you, Your Honor.

MR. SELDON: Thank you, Your Honor.

(Whereupon, at 4:25 o'clock p.m., the hearing in the above-captioned matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, ROBERT W. PECORD, a Verbatim Reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the action.

COPY

ROBERT W. PECORD
Court Reporter

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for The National Bank of Washington,
Plaintiff-Appellee,

v.

VIENNA MORTGAGE CORPORATION,
Defendant-Appellant.

Case Nos. 92-1091,
92-1092 (Consolidated)

THE FEDERAL DEPOSIT INSURANCE CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO PUBLISH DECISION

Rule 36.4 of the Fourth Circuit Internal Operating Procedures states, in pertinent part, that an opinion delivered by the Court may be published if it either "establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit" or "involves a legal issue of continuing public interest." In *FDIC v. Vienna Mortgage Corporation* ("*VMC*") (copy attached hereto) this Court explains and clarifies 12 U.S.C. § 1823(e) and 12 U.S.C. § 1821(d)(13)(D), neither of which has been previously addressed by the Fourth Circuit. Moreover, because these provisions were enacted as part of the congressional response to the national savings and loan crisis, the opinion in *VMC* provides guidance to lower courts, federal agencies and private parties on issues of continuing public interest.

I. THE OPINION CLARIFIES AND EXPLAINS THE RULE OF LAW IN THE FOURTH CIRCUIT CONCERNING SECTIONS 1823(e) AND 1821(d)(13)(D)

A. Section 1823(e)

Section 1823(e), which was enacted by Congress in 1950 and subsequently reenacted as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989) ("FIRREA"), serves to protect the federal banking agencies from the enforcement of agreements which do not satisfy its categorical requirements.[1] *See Langley v. FDIC*, 484 U.S. 86, 95 (1987) ("Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew."). Section 1823(e) allows federal and state bank examiners to rely solely on a failed institution's records in evaluating the worth of its assets. *Langley*, 484 U.S. at 91-92.

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[1] Section 1823(e) states:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.
>
> 12 U.S.C. § 1823(e) (Supp. II 1990).

In *VMC*, this Court explains the application of Section 1823(e) in the Fourth Circuit. The opinion states that "[t]he language of § 1823(e) clearly says '*no* agreement... shall be valid' against the receiver unless it satisfies *each* of the enumerated elements." *VMC*, slip op. at 7 (emphasis added). As this Court recognized in *VMC*, the requirement that each of the four criteria in the provision be satisfied for an agreement to be valid against the Federal Deposit Insurance Corporation ("FDIC") is the clear rule of law in *other* circuits. *VMC*, slip op. at 7 (citing *RTC v. McCrory*, 951 F.2d 68 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992); *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992)). To date, however, the Fourth Circuit has published no opinion explaining the application of Section 1823(e). As a result, the lower courts of the Fourth Circuit still lack guidance as to the rule of law governing the application of Section 1823(e).

Given the volume of litigation arising as a result of the failure of financial institutions, Section 1823(e) is certain to be applied in future litigation before the federal courts within the Fourth Circuit. To ensure uniformity in the application of 1823(e), district courts need guidance from this Court. Moreover, parties and potential parties to litigation involving failed financial institutions need to clearly understand how Section 1823(e) will be applied so that they can properly assess their rights and responsibilities under the statute, as does anyone who contemplates doing business with a federally-insured financial institution.

B. Section 1821(d)(13)(D)

Section 1821(d)(3) grants the FDIC authority to determine all claims filed by creditors of an insolvent institution. Jurisdiction over such claims is granted exclusively to the FDIC by Section 1821(d)(13)(D).[2] Until these claims have been formally

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[2] Section 1821(d)(13)(D) states:

disallowed by the FDIC or the statutory 180-day limit for deciding the claim has expired, no court has jurisdiction to hear the claims. 12 U.S.C. § 1821(d)(5)(A); *VMC*, slip op. at 7-9.

The Fourth Circuit previously has not explained in a published decision the application of Section 1821(d)(13)(D) or the requirement it imposes that all administrative remedies be fully exhausted before judicial review of a claim is proper. The *VMC* opinion explains this rule of law and also clarifies it by holding that a claimant may not invoke a "futility" exception to the exhaustion requirement. *VMC*, slip op. at 9. Because no published case law exists in the Fourth Circuit explaining or clarifying Section 1821(d)(13)(D), this Court and the district court below were forced to look to a Third Circuit precedent for guidance, *Rosa v. RTC*, 938 F.2d 938 (3d Cir. 1991). Publication of *VMC* will provide the courts of the Fourth Circuit and litigants with a clear rule of law concerning the application of Section 1821(d)(13)(D).

II. SECTIONS 1823(e) AND 1821(d)(13)(D) WERE INTENDED TO CONFRONT THE SAVINGS AND LOAN CRISIS AND IMPLICATE ISSUES OF CONTINUING PUBLIC INTEREST

Congress enacted FIRREA in response to the "emergency nature" of the crisis in the savings and loan industry. *See* H.R.

> Except as otherwise provided in this subsection, no court shall have jurisdiction over —
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquired from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.
>
> 12 U.S.C. § 1821(d)(13)(D) (Supp. II 1990).

Rep. No. 54(I), 101st Cong., 1st Sess. 304 (1989), *reprinted in* 1989 U.S.C.C.A.N. 100-01. Many federal courts have recognized the importance of FIRREA and the substantial federal policies implemented by its provisions. *See e.g., Wright*, 942 F.2d at 1096 ("[T]he circumstances leading to the enactment of FIRREA involved matters of great national concern.") *FDIC v. 232 Inc.*, 920 F.2d 815, 818 (11th Cir. 1991) ("This case involves an agency of the federal government and an issue of national concern."). Because Sections 1823(e) and 1821(d)(13)(D), which were enacted as part of FIRREA, govern subjects as important as the type and manner of claims that may be asserted against the FDIC — ultimately the American taxpayer — their application is a legal issue of continuing public interest. *See 232 Inc.*, 920 F.2d at 818 ("'The interests of the American taxpayer demand an expedited resolution to the monumental problems involved with the unprecedented costs of dealing with hundreds of insolvent thrifts and the orderly disposition of the assets of these failed institutions.'") (quoting H.R. Rep. No. 54(I), 101st Cong., 1st Sess., pt. 1, at 308 (1989), *reprinted in*, 1989 U.S.C.C.A.N. 86, 104.).

Indeed, as financial institutions continue to fail and the amount of litigation involving federal banking agencies continues to increase, the courts within the Fourth Circuit will encounter a significant number of cases involving Sections 1823(e) and 1821(d)(13)(D). As many other circuits have shown by example, an explanation of these provisions is necessary and beneficial. *See e.g., Wright*, 942 F.2d 1089 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1937 (1992) (12 U.S.C. § 1823(e)); *RTC v. McCrory*, 951 F.2d 68 (5th Cir.), *cert. denied*, 113 S. Ct. 459 (1992) (12 U.S.C. § 1823(e)); *Twin Constr. Inc. v. Boca Raton Inc.*, 925 F.2d 378 (11th Cir. 1991) (12 U.S.C. § 1823(e)); *FDIC v. Rivera-Arroyo*, 907 F.2d 1233 (1st Cir. 1990) (12 U.S.C. § 1823(e)); *FDIC v. Krause*, 904 F.2d 463 (8th Cir. 1990) (12 U.S.C. § 1823(e)); *Henderson v. Bank of New England*, 986 F.2d 319 (9th Cir. 1993) (12 U.S.C. § 1821(d)(13)(D)); *Meliezer v.*

RTC, 952 F.2d 879 (5th Cir. 1992) (12 U.S.C. § 1821(d)(13)(D)); *FDIC v. Shain Schaffer & Rafanello*, 944 F.2d 129 (3d Cir. 1991) (12 U.S.C. § 1821(d)(13)(D)).

CONCLUSION

For the above stated reasons, the Court of Appeals should grant FDIC-Receiver's motion to publish the opinion in *FDIC v. Vienna Mortgage Corporation.*

Respectfully submitted.

By: /s/_____

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Attorney for Federal
Deposit Insurance
Corporation as Receiver
for The National Bank
of Washington

Dated: April 7, 1993

STATEMENT OF NOTIFICATION AND CONSENT

Pursuant to Local Rule 27(b), all counsel for the parties in this proceeding have been notified that FDIC shall file this Motion to Publish Decision and have stated that they do not intend to file a response to the motion.

/s/_____
John G. Heard

CERTIFICATE OF SERVICE

I, John G. Heard, hereby certify that on April 7, 1993 I caused the foregoing Motion to Publish Decision to be served by hand upon Robert C. Seldon, Krooth & Altman, 2101 L Street, N.W., Suite 210, Washington, D.C. 20037 and by first class mail, postage prepaid, to Neil D. Goldman, Young & Goldman, 510 King Street, Alexandria, Virginia 22313.

/s/_____
John G. Heard

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEDERAL DEPOSIT INSURANCE CORP.,
as receiver for the National Bank of Washington,
Plaintiff,

versus,

WASHINGTON MORTGAGE GROUP, INC .,
Defendant.

CIVIL ACTION NO. 91-1042-A

Alexandria, Virginia
Friday, November 1, 1991

The above-entitled action came on to be heard before the Honorable T.S. Ellis, III, a Judge for the United States District Court for the Eastern District of Virginia, in Courtroom V, 200 South Washington Street, Alexandria, Virginia 22313, beginning at 2:45 o'clock p.m.

APPEARANCES:

For the Plaintiff:

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AND

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For the Defendant:

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AND

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* * *

THE COURT: All right. Thank you. Mr. Klein, do you want to respond?

MR. KLEIN: Yes, quite briefly, Your Honor. First of all, we've cited a number of cases in our brief concerning a situation where you had a compulsory counterclaim and the court did not have subject matter jurisdiction over those compulsory counterclaims, and those were dismissed, or if the action had been instituted prior to receivership, those actions were stayed.

Your Honor, we're here in the first place in this litigation because the defendant did not go through the claims process in the first place. What the defendant has really done here is obtained a preference over other creditors of NBW, Your Honor. They kept funds, used self-help, refused to follow the claims process, and that's why we're here, and we cannot let them not go through the claims process a second time with respect to the counterclaim.

Thank you, Your Honor.

THE COURT: Let me ask you, though, while you're there, Mr. Klein, to respond once again to Mr. Seldon's argument — well, two arguments. One is how long would this administrative remedy take?

MR. KLEIN: I believe the statute requires 180 days is the maximum as to when a claim has to be admitted or denied, but it can be done in a shorter time, Your Honor.

THE COURT: Well, how long do you think it would take to do this one? Your client certainly is familiar with it.

MR. KLEIN: Your Honor, I checked that issue before I came here, and they have no idea. I asked people how long it would take. It's a separate division that deals with claims other than the legal division, the people that I'm involved with, and it just depends upon the backlog and what they're doing.

THE COURT: Is there a trial date set in this case yet?

MR. KLEIN: No, Your Honor. We have a pretrial set for November 21st.

THE COURT: So the trial will likely be in February.

MR. KLEIN: I assume that's correct, Your Honor. We're certainly ready to go to trial.

THE COURT: Let's assume for a moment that this matter is submitted to the FDIC and that the FDIC thinks about it and says no. Any reason why the Court shouldn't then let the counterclaim be added, even if it's on the eve of trial?

MR. KLEIN: Your Honor, we wouldn't have a problem with that, but it would have to jump through an additional hoop, which we would certainly cooperate on, and that is, under the statute, if a claim is denied under the claims process, it can only be litigated in the District of Columbia or the principal place of business of the institution. Since we're dealing with NBW, it is also the District of Columbia. What would happen — and this

is not infrequent, because we go through this exercise all the time — the action could be filed in the District of Columbia; they could request a 1404 transfer; we would consent to that transfer, and it could be consolidated back into this litigation.

THE COURT: And tell me concretely why Mr. Seldon is wrong in your view that litigation of your claim against the defendant automatically litigates the counterclaim?

MR. KLEIN: I just don't think that that's true, Your Honor. There's a number of theories, there's a number of ways this could come out, but they seem to be separate issues, as we discussed when I was up here the first time, Your Honor. And I don't think that it —

THE COURT: Spell it out a little bit on why they're separate.

MR. KLEIN: Because this is an unjust enrichment theory, if they have to return the money — unjust enrichment, I believe, is an equitable principle, and they could find on that. If they have to return the 770,000, there's no reason why they should be barred.

THE COURT: The theory on returning the 770,000 is simply that the provision that permits them to keep it under the contract is not a provision that's enforceable against the FDIC.

MR. KLEIN: Right, Your Honor.

THE COURT: It might be against National Bank of Washington, but not against FDIC. And the theory of the defendants on the counter claim is that the parties, in effect, did not intend to permit such a prompt termination because it would, in essence — in other words, if you paid $2 million and terminated it the next day, the $2 million would be, in effect, a gift, and that makes no sense in their view. And that isn't what the parties intended, and to the extent that the contract has an ambiguity that could be interpreted that way, they say it's wrong

— it's contrary to the intent of the parties. That's in essence what they're saying?

MR. KLEIN: It appears to me to be, Your Honor.

THE COURT: And you say that's different from the legal issue, whether under the statute a retention provision is enforceable against the FDIC. It has nothing to do with the parties' intent on whether the contract could be terminated so quickly.

MR. KLEIN: Separate, Your Honor, and we believe they could be litigated separately.

THE COURT: But you agree that if the administrative claim were completed before the trial date that there would really be no difficulty in litigating them in the same case?

MR. KLEIN: No, Your Honor, we don't have a problem with that, and we would do what would be necessary to consent to transfer and move that process through quickly.

THE COURT: All right. I'm going to take a 10-minute recess, it may be 15 minutes, and I'll have the Marshal or the Clerk will tell you when I'm ready to return and give a decision in this matter.

All right, court stands in recess for 15 minutes.

(Recess)

THE COURT: I took a bit longer than I anticipated.

The briefs were quite good, and I appreciate counsels' efforts in that regard. I did receive your update, that is, the decisions that you thought had been left out. All right — that is on behalf of the Washington Mortgage Group.

The Court concludes at length that the motion to dismiss the counterclaim must be granted. The Court concludes that the statute does require, that is, 1821(d)13(d), does provide for administrative review and claims procedure which must be exhausted and has not been.

The Court does not need to make a sweeping decision that under no circumstances could futility be an exception; the Court is satisfied that in this circumstance futility is not an exception, much like the Rosa case. In any event, I don't see any difficulty because I think that the resolution of this claim, that is the main claim by the FDIC against the Washington Mortgage Group, does not necessarily extinguish the claim asserted in the counterclaim. In any event, I don't think that will be necessary.

I would expect, Mr. Seldon, that the claim would be promptly filed; and, Mr. Klein, I would expect that it will be promptly considered and disposed of and this case will proceed on schedule, but I anticipate that it will be disposed of administratively long before this case — or substantially before this case comes to trial. And at that time, the procedure that you outlined or that you indicated could be followed, Mr. Klein, should be followed, namely, filing in the District of Columbia followed by a 1404(a) transfer here.

But, in any event, the Court ultimately concluded that the Rosa case was in point. I think there is also a strong jurisdictional argument. I didn't have to reach that strong a point because I think that it isn't necessarily futile simply because of the position they're taking here. So I did not have to reach the issue based on separation of powers and the like, that the Court shouldn't read into it a futility.

I'd be inclined not to do that Mr. Klein. I can anticipate, or I can imagine circumstances where futility might be an exception. In this instance, however, I think the statutory scheme can be given its full effect so that the claim can be administratively processed, and, indeed, it may be back here in time. If it does not arrive back here in time, then, based on the Court's review of the material and of the claims, it would appear like the Rosa claim, it may not be disposed of. But, in any event, I don't believe it is futile.

What the FDIC is saying in this case is that the portion of that contract that says you get a $700,000 termination fee, that is what's unenforceable against the FDIC, not any other portion of the contract and not the entire contract as a whole. Whether or not there is some provision in the contract that would have prevented such a prompt termination or some ambiguity could be read to do that is not a matter that I see being litigated in this main claim, nor do I see that as a matter that would be foreclosed by the light of that narrow issue.

Am I right, Mr. Klein, that it is a narrow issue that you seek to litigate in your main claim to recover the 700,000?

MR. KLEIN: That's true, Your Honor.

THE COURT: All right. I thank counsel for their cooperation. The briefs were good and oral arguments were very helpful. The court will enter an appropriate order.

You may call the next matter.

(Whereupon, at 4:05 o'clock p.m., the hearing in the above-captioned matter was concluded.)

CERTIFICATE OF COURT REPORTER

I, VICKY A. PECORD, a Verbatim Reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by parties thereto; nor financially or otherwise interested in the action.

COPY

VICKY A. PECORD
Court Reporter

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Master File No. 90-1755
(RCL)

Civil Action No. 91-0626
(RCL)

Filed: March 11, 1992
Clerk, U.S. District Court
District of Columbia

In Re NBW Commercial Paper Litigation

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as a receiver of
THE NATIONAL BANK OF WASHINGTON,
Defendant.

MEMORANDUM OPINION

This case is one of the 43 consolidated cases that comprise the litigation captioned *In re NBW Commercial Paper Litigation,* Master File No. 90-1755. In a status call attended by attorneys from virtually every law firm in the District of Columbia, all counsel agreed to use the action brought by the American Federation of State, County, and Municipal Employees ("AFSCME") as a test case for plaintiffs' claims against the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as receiver for the National Bank of Washington ("NBW").[1] By

[1] Most of the plaintiffs have filed two separate actions, one seeking relief from the FDIC as receiver for NBW and the other seeking damages against various former officers and directors of NBW. These motions, and particular-

agreement of all counsel, the defendant, the FDIC, in its capacity As receiver of NBW, filed two motions to dismiss. The first motion, is granted, would eliminate all of AFSCME's claims and spell doom for the vast majority of claims in the other 20 against the FDIC, which are substantially identical to this one. [2]

The second motion, if granted, would result in the dismissal of all other claims, including those raised by other plaintiffs, but not by AFSCME.[3] Because both motions involve similar issues regarding the common-law *D'Oench* doctrine and certain sections of FIRREA which may create an absolute defense from

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ly the second motion to dismiss, concern the following actions: *George Hyman Constr. Co. v. FDIC*, C.A. No. 90-1297; *Kaempfer Co v. FDIC*, C.A. No. 90-1696; *Columbia Real Estate Title Ins. Co. v. FDIC*, C.A. No. 90-1702; *Telemet America. Inc. v. FDIC*, C.A. 90-1753; *Route 35 Shrewsbury v. FDIC*, C.A. No. 90-1766; *Sherman R. Smoot Corp. v. FDIC*, C.A. No. 90-1795; *Ward Corp. v. FDIC*, C.A. No. 90-1810; *International Ass'n of Machinists & Aerospace Workers v. FDIC*, C.A. No. 90-1822; *National Theatre Corp. v. FDIC*, C.A. No. 90-1837; *World Plan Executive Council v. FDIC*, C-A. No. 90-1841; *Clarendon Square Assocs. v. FDIC*, C.A. No. 90-1874; *Thomas Dodd v. FDIC*, C.A. No. 90-1875; *Bresler & Reiner v. FDIC*, C.A. No. 90-3017; *Richard J. Barber Assocs. v. FDIC*, C.A. No. 90-3089; *Scowcroft v. FDIC*, C.A. No. 91-0996; *Clinton & Co. v. FDIC*, C.A. No. 91-0997; *T.J.B., Inc. v. FDIC*, C.A. No. 91-1704; *Stein v. FDIC*, C.A. No. 91-1706; *Bafton Corp. v. FDIC*, C.A. No. 91-1838; *Colson Servs. Corp. v. FDIC*, C.A. No. 91-1839.

[2] Although the court will focus on AFSCME's claims with respect to the first motion to dismiss, all of the analysis below is relevant to the identical claims made by the other plaintiffs. The FDIC's second motion to dismiss directly relates to the claims of the other plaintiffs.

[3] A few claims by various plaintiffs are treated in neither motion to dismiss. These include Count V (unauthorized disclosure of confidential financial information) in *Columbia Real Estate Title Ins. Co. v. FDIC*, Civ. No. 90-1702; Count XIII (declaratory judgment that promissory note was executed under undue pressure and duress) and Count X (breach of contract for failure to purchase WBC commercial paper) in *Kaempfer Co. v. FDIC*, Civ No. 90-1696; Count VII (breach of contract for failure to purchase WBC commercial paper) in *National Theater Corp. v. FDIC*, Civ. No. 90-1837.

liability for the FDIC, much of the court's initial discussion of the law will apply to both motions.

I. The Facts

All 43 cases arise from the failure of the National Bank of Washington ("NBW"). For the purpose of this motion, the court must accept the plaintiffs' rendition of the facts; the facts in most of the cases are not substantially in dispute.[4] Washington Bancorporation ("WBC")[5], the holding company which owned NBW, decided to issue commercial paper in July of 1984. NBW served as the exclusive agent of WBC for the purposes of marketing this commercial paper. To support this program, WBC obtained backup lines of credit from various major banks. In 1989, these banks included Marine Midland Bank, Chase Manhattan Bank, Manufacturers Hanover Bank, and Bank of New York. These backup lines of credit were crucial to the commercial paper program because WBC's debt covenants with Mutual Life Insurance Company of New York required WBC to maintain supporting lines of credit that accounted for 50% of its outstanding commercial paper; in addition, the Federal Reserve Bank of Richmond advised WBC that Federal Reserve guidelines also required supporting lines of credit equal to 50% of the outstanding commercial paper.

All of the plaintiffs in the consolidated cases, including AFSCME, were customers of NBW. All of these companies and individuals invested funds through NBW, most on an overnight basis. All claim to have preferred a low-risk approach to investment and to have communicated this preference to the ap-

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[4] The court culled these facts from AFSCME's complaint and from AFSCME's motion for summary judgment on Count I of the complaint (violation of § 12(1) of the Securities Act of 1933). This motion was withdrawn by agreement of the parties so that the court could resolve the legal issues raised by the FDIC's motions to dismiss.

[5] WBC did not have its own officers or directors. Rather, employees of NBW performed any tasks which WBC required.

propriate officials at NBW. A recitation of the facts of AFSCME's particular case is sufficient to explain generally the events which support all of the plaintiffs' claims. Under a Master Repurchase Agreement, NBW agreed to invest AFSCME's funds in appropriate financial instruments and then to repurchase these financial instruments the following day. AFSCME invested solely in U.S. Treasury Notes and other U.S government obligations until early 1988, when NBW offered to sell AFSCME commercial paper on an overnight basis. AFSCME alleges that officers of NBW told them that WBC commercial paper was as safe an investment as the government securities which AFSCME had previously been purchasing. Further, AFSCME claims that at no time were they aware that the commercial paper which they were purchasing was issued by WBC, the parent corporation of NBW.

By 1990, WBC and NBW found themselves in extreme financial difficulty. Because of the financial instability of NBW, the four banks which provided the backup lines of credit in early April of 1990; no other banks could be found to provide alternate lines of credit. At this time, WBC and NBW lacked the cash flow to pay off the vast majority of the $45 million dollars in commercial paper that was outstanding. Because, however, investors, such as AFCSME and the other plaintiffs, continued to roll over their money from one overnight investment to another, NBW was not initially faced with the prospect that it would have to default on the commercial paper. AFSCME alleges that NBW did not inform any of the plaintiffs of the failure of its lines of credit (or of the bank's precarious financial position) and that the bank continued to invest their funds in WBC commercial paper. On May 2, 1990, representatives of the Federal Reserve and the Office of the Comptroller of the Currency met with NBW directors to warn them that the further issuance of commercial paper was an unsound practice. On Friday, May 4, 1990, NBW invested $1,800,000 of AFSCME's money in WBC commercial paper that was to

mature on Monday, May 7, 1990. On May 7, 1990, WBC announced that it was defaulting on the $25,800,000 of commercial paper that it was to mature on that day; the bank also defaulted on $10,900,000 of commercial paper which matured subsequently. WBC filed for Chapter 11 bankruptcy on August 1, 1990, and, on August 10, 1990, the Comptroller of the Currency closed NBW and appointed the FDIC as receiver.

II. Procedural History

Following the procedures set out in the Financial Institutions Return, Recovery, and Enforcement Act of 1989 ("FIRREA"), AFSCME filed an administrative claim with the FDIC, as receiver for NBW, demanding the return of the $1.8 million which they had invested in commercial paper. The FDIC rejected this claim within the 180 days allotted by the statute. The FDIC's notice to AFSCME stated:[6]

> After review of AFSCME's claim, the FDIC has determined that AFSCME's claim is totally disallowed. The claimant has not proven its claim to the satisfaction of the receiver based on applicable principles of common and statutory law, including *D'Oench, Duhme and Co. v. FDIC*, 315 U.S. 447 (1942), 12 U.S.C. §§ 1821 (d) (9), 1823 (e) and governing principles applicable to the awards of punitive damages against the FDIC.

Letter from FDIC to AFSCME (Feb. 13, 1991).

Having exhausted their administrative remedy as required by law, AFSCME filed suit in this court on March 6, 1991, alleging violations of federal securities laws (both the Securities Act of 1933 and the Securities Exchange Act of 1934), various common law claims, and violations of the District of Columbia's Blue Sky laws. Most of the other plaintiffs have filed similar actions, though some raise claims which AFSCME has not.

[6] The other plaintiffs all received substantially identical notices.

Also consolidated in this action (for pretrial purposes only) are the plaintiffs' related actions against various individual directors of NBW.[7] The individual directors have no direct involvement in this motion because they cannot raise the statutory and common law defenses peculiar to the FDIC when it assumes the responsibilities of a failed bank.

Thanks to the efforts of counsel for AFSCME and the FDIC, all parties agreed on October 3, 1991, to stay the consolidated actions pending the court's resolution of the FDIC's motion to dismiss the AFSCME complaint and its motion to dismiss or strike the remaining claims. The parties and the court agreed that resolution of these particular defenses was crucial to the possibility of a negotiated solution. All of the plaintiffs have had an opportunity to respond to these motions, both in writing and orally. The court held oral argument on January 28, 1992, and has attempted to resolve these difficult issues as promptly as possible.

III. The History of the *D'Oench* doctrine and its Statutory Counterparts.

The FDIC does not at this time deny any of the allegations made by the various plaintiffs. Rather, the FDIC argues that is "stands in a different position" than the failed bank and the individual defendants. *Jackson v. Brown-Knox & Assocs.*, No. 88-2273, slip. op. at 16 (C.D.Ill. Sept. 5, 1990). The FDIC

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[7] Other cases related to this action which are currently before this court include: a proposed class action by purchasers of WBC common stock, *see Shields v. Washington Bancorporation*, C.A. No. 90-1101; a suit by NBW and WBC against individuals who allegedly attempted to illegally seize control over the bank, *see Washington Bancorporation v. Said*, C.A. No. 88-3111; an action against various officers and directors of NBW for violations of federal securities laws, *see SEC v. Coleman*, C.A. No. 91-2526; and three suites by officers and directors of NBW seeking attorneys' fees from the FDIC as receiver for NBW, *see Pollard v. FDIC*, C.A. No. 91-1802; *Toups v. FDIC*, C.A. No. 91-2187; *Binder v. FDIC*, C.A. No. 91-2364.

argues that it can even admit fraudulent conduct on the part of the NBW, yet still assert, as complete defenses to plaintiffs' claims, the protection afforded to the FDIC by the common-law *D'Oench* doctrine and two statutory provisions of FIRREA. To fully analyze this rather arcane area of the law, the court must first digress with a substantial amount of background material.

A. The *D'Oench* Doctrine

The genesis of the doctrines at issue in this case occurred in 1942 in the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).[8] In *D'Oench*, the FDIC sought to enforce a note which it had acquired in a purchase and assumption transaction with a failed bank. The maker of the note raised as a defense an oral agreement with the bank that the note would never actually be called for payment. *See id.* at 456. The Supreme Court held that this defense was invalid against the FDIC because of the "federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks which [the FDIC] insures." *Id.* at 457. Federal banking regulators must be able to rely on the records of the banks that the FDIC insures so that they will be able to assess accurately a bank's solvency. *See id.* at 460. While *D'Oench* did not set out a specific test to identify cases where application of this doctrine would be appropriate, the Court did note that "[i]t would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." *Id.* at 460.[9]

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[8] The phonetic spelling of *D'Oench* is simply "dench."

[9] The court in *D'Oench* noted that loans which would never be called for payment would effectively pad the bank's portfolio of assets, thereby making the bank appear more solvent than it actually was. *See id.* at 460.

D'Oench has evolved substantially over the past forty years, applying to situations somewhat different from the facts of the original case.[10] One court has called *D'Oench* "expansive and perhaps startling in its severity." *Bowen v. FDIC*, 915 F.2d 1013, 1015 (5th Cir. 1990). Although the Supreme Court has never relied on the *D'Oench* doctrine directly in any case since 1942, lower courts have held the *D'Oench* applied to oral promises to make a loan, *see Timberland Design Inc. v. First Service Bank*, 932 F.2d 46 (1st Cir. 1991); *Bowen v. FDIC*, 915 F.2d 1013 (5th Cir. 1990); *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 749 F.Supp. 635 (D.N.J. 1990); oral contracts to repurchase loans, *see First State Bank v. City & County Bank*, 872 F.2d 707 (6th Cir. 1989); fraudulent inducement of another bank into a loan participation agreement, *see FDIC v. Texarkana Nat. Bank*, 874 F.2d 264 (5th Cir. 1989), *cert. denied*, 110 U.S. 837 (1990); *Royal Bank of Canada v. FDIC*, 733 F.Supp. 1091 (N.D.Tex 1990); fraudulent misrepresentations regarding property or securities sold by the lending bank, *see Fair v. NCNB Texas Nat. Bank*, 733 F.Supp. 1099 (N.D.Tex 1990); *Jackson v. Brown-Knox & Assocs.*, No. 88-2273 (C.D.Ill. Sept. 5, 1990); and oral representations that checks initially dishonored would be honored, *see Carico v. First Nat. Bank of Bogata*, 734 F.Supp. 768 (E.D.Tex. 1990). *D'Oench* was also expanded to apply to cases where the FDIC is acting in its capacity as receiver, and not simply to cases where the FDIC, in its corporate capacity, is affirmatively seeking to recover.[11] *See Bell & Mur-*

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[10] Courts have often stated that the result of *D'Oench* is to create "quasi-holder-in-due-course" status for the FDIC. *See Agri Export Cooperative v. Universal Sav. Ass'n*, 767 F.Supp. 824, 831 (S.D.Tex. 1991).

[11] This expansion of *D'Oench* was necessary because § 1823(e), as originally enacted in 1950, applied only to FDIC-corporate. The evolution of *D'Oench* responded to the attempts by debtors to bring affirmative suits against FDIC-receiver to avoid the requirements of § 1823(e). Courts also have applied *D'Oench* to cases which involve other government agencies and institutions with a mission similar to that of FDIC — FSLIC and bridge

phy & Assoc., Inc. v. Interfirst Bank Gateway, 894 F.2d 750, 753 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 244; *Beighley v. FDIC*, 868 F.2d 776, 783 (5th Cir. 1989). In addition, most courts, though not all, have refused to permit plaintiffs to recast their claims as torts or violations of federal securities laws. *See FDIC v. State Bank of Virden*, 893 F.2d 139 (7th Cir. 1990) (stating that *D'Oench* and § 1823 (e) apply to torts or any claim based on an unwritten agreement); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 954 (1991) (holding that *D'Oench* bars borrowers' securities law claims); *but see Astrup v. Midwest Fed. Sav. Bank*, 886 F.2d 1057, 1059 - 60 (8th Cir. 1989) (holding that suits that sound in tort are not barred by *D'Oench*); *Central Nat. Bank v. FDIC*, 771 F.Supp. 161 (E.D.La. 1991) (same). In these cases, the courts have refused to distinguish on the grounds of technical differences in pleading when the allegations actually center around an oral agreement and an arrangement which would tend to mislead bank examiners.

Nonetheless, the paradigmatic application of the *D'Oench* doctrine remains in the lender-borrower context; the vast majority of cased interpreting the doctrine have involved, despite the complexity of the transaction or the procedural posture of the case, individuals or entities who owed money to the bank and who sought to avoid payment of their notes by asserting an oral side agreement. The FDIC forcefully argues that *D'Oench* has regularly been applied outside the lender-borrower context; plaintiff AFSCME rejects this characterization and seeks to explain the recent expansion of *D'Oench* as refinements within the lender-borrower context or, quite simply, as mistakes. No interpretation of *D'Oench*, however, would be

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banks. *See FSLIC v. Two Rivers Assoc., Inc.*, 880 F.2d 1267, 1277 (11th Cir. 1989) (applying *D'Oench* to FSLIC); *Kilpatrick v. Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990) (applying *D'Oench* to bridge banks). FIRREA expressly expands the protections of § 1823(e) to both FDIC-receiver and these other institutions.

proper without first considering the statutory regime which fosters the same policies that generated *D'Oench*.

B. 12 U.S.C. § 1823(e)

In 1950, Congress passed 12 U.S.C. § 1823(e) which barred certain claims against the FDIC which did not meet the statute's stringent writing requirements. Under its original terms, the provision applied only to FDIC in its corporate capacity; FIRREA, however, amended § 1823(e) to apply additionally to the FDIC in its capacity as receiver of a failed bank. § 1823(e) currently reads as follows:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1988).

The writing requirements set forth in subsections (1) - (4) have been strictly adhered to by courts that have considered them. Parties who have piecemeal supporting documentation or who allege that a series of documents would satisfy the

writing requirement have generally been denied relief. *See FSLIC v. Gemini Management*, 921 F.2d 241, 245 (9th Cir. 1990); *Beighley v. FDIC*, 868 F.2d 776, 782 (5th Cir. 1989). In some cases, parties adverse to the FDIC have been denied discovery that they have alleged would demonstrate the fulfillment of the writing requirements. *See FSLIC v. Cribbs*, 918 F.2d 557, 560 (5th Cir. 1990); *FDIC v. Virginia Crossings Partnership*, 909 F.2d 306, 309 -10 (8th Cir. 1990).

Since *D'Oench* and the enactment of § 1823(e), the Supreme Court has had occasion to consider this area of law only once. In *Langley v. FDIC*, 484 U.S. 86 (1987), the purchaser of a piece of property sought to avoid payment on his note on the ground that the failed bank had procured the note by misrepresentations concerning the characteristics of the land. The Supreme Court discussed *D'Oench* as a precursor of § 1823(e) and held that the term "agreement" in § 1823(e) should be interpreted broadly to encompass conditions on performance. *See id.* at 92 - 93. According to the Court, petitioner was, in essence, seeking to enforce an oral warranty on the property through an action for fraud. The Court held that § 1823(e) barred such claims and opened the door for an expansive interpretation of the statute. The Court suggested that, if the requirements of § 1823(e) were not fulfilled, only a claim of fraud in the factum, i.e. a forged signature on an instrument, would survive. *See id.* at 93 -94.

C. 12 U.S.C. § 1812(d)(9)(A)

FIRREA also added § 1821(d) (9) (A), which provides that "any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation." 12 U.S.C. § 1821(d) (9) (A) (1991). Few courts as yet have an occasion to interpret this provision and most that have considered it have not clearly differentiated the provision form the *Langley* Court's interpretation of § 1823(e). *See*

McCaugherty v. Sifferman, 772 F.Supp. 1128, 1136 (N.D. Cal. 1991); *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 749 F.Supp. 635, 645 (D.N.J. 1990).

IV. The Interrelationship between *D'Oench*, 12 U.S.C. § 1823(e) and 12 U.S.C. § 1821 (d) (9) (A)

The FDIC and the plaintiff sharply disagree on the scope of and relationship among the common law *D'Oench* doctrine and the two statutory provisions at issue. The FDIC's initial memorandum argued that the *D'Oench* doctrine and the two statutory provisions each independently bar AFSCME's claims; the FDIC, however, provided no theory as to how the statute and the common law fit together and made no attempt to distinguish between the two statutory provisions. AFSCME's opposition sets forth a powerful argument that *D'Oench* has been completely pre-empted by the passage of FIRREA in 1989; under this argument, any extra protection which the flexible common-law doctrine might have provided to the FDIC was extinguished by the statute. Through their numerous subsequent memoranda and at oral argument, the FDIC addressed these issues with a new theory of interpretation which differentiates the two statutory provisions and suggest that *D'Oench* extends protection to the FDIC beyond that of the two statutory provisions.

The court resolves these issues below, but notes first that the exact interplay of the *D'Oench* doctrine and the statute does not substantially affect the court's final decision. Over the years, the case law surrounding *D'Oench* and the statute (particularly § 1823(e)) has crossed-pollinated such that it is very difficult to decide where the statute ends and *D'Oench* begins. *See Royal Bank of Canada v. FDIC*, 733 F.Supp. 1091, 1095 (N.D. Tex. 1990) (describing how § 1823(e) and *D'Oench* are interpreted in tandem). Thus, the crucial question is the total protection that the statute and *D'Oench* together provide. The court believes, however, that an attempt to parse the difficult issues is warranted. Most courts have simply ignored the issue,

and few, if any, parties have squarely raised these questions. *See Timberland Design Inc. v. First Service Bank*, 932 F.2d 46, 51 (1st Cir. 1991) (declining to consider the pre-emption issue as not properly raised). This court has had the benefit of extensive briefing and the excellent arguments for counsel for both sides. It is to the interrelationship of the statute and *D'Oench* that the court now turns.

A. The Pre-emption of *D'Oench* by FIRREA

AFSCME argues that the common-law *D'Oench* doctrine has been pre-empted by the passage of FIRREA, which, they allege, Congress intended to be a comprehensive reform of the banking system. Under this theory, Congress occupied the field of banking regulation by passing FIRREA, thus replacing existing federal common law and obviating much of the need for new common law pronouncements. *See Northwest Airlines, Inc. v. Transport Workers Union, 451, U.S. 77, 97 - 98 (1981).* Plaintiff notes that the Supreme Court's jurisprudence in pre-emption cases establishes a presumption in favor of pre-emption; Congress need not affirmatively proscribe in use of federal common law. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). The FDIC urges the court to reject this invitation to abandon *D'Oench*, a venerable doctrine which has survived and grown for half a century, including over two years subsequent to the passage of FIRREA.

Both parties appeal to judicial restraint to support their positions. Plaintiff correctly reminds the court that federal common law is interstitial in nature and should not be routinely fabricated absent a need for "an unusual exercise of lawmaking by federal courts." *City of Milwaukee*, 451 U.S. at 314; *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1981). Further, the open-ended nature of federal common law generally, and the *D'Oench* doctrine in particular, leaves the court the uncomfortable task of discovering and implementing policy, a situation rarely appropriate for an Article III body. *D'Oench* , after all,

is less a rule and more an expression of a federal policy. Plaintiff, both in their memoranda and most strongly in their counsel's oral argument, admonish the court that separation of powers requires the rejection of *D'Oench*. The FDIC, however, equally cautions that no court has ever held that *D'Oench* was pre-empted, although numerous courts have had the opportunity, both pre- and post-FIRREA. *See, e.g. Hall v. FDIC*, 920 F.2d 334, 339 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2852 (1991) (rejecting pre-emption pre-FIRREA); *FDIC v. McClanahan, 758 F.2d 512, 514 n.1 (5th Cir. 1986) (same); Midwest Sav. Ass'n v. National W. Life Ins. Co.*, 759 F.Supp. 1282, 1290 n.6 (D.Minn. 1991) (rejecting pre-emption post-FIRREA); *Castleglen Inc. v. Commonwealth Sav. Ass'n*, 728, F.Supp. 656, 662 (D.Utah 1989) (same). Further, most courts continue to apply *D'Oench* and the statutory provisions together without even considering the pre-emption question. Nonetheless, while the pre-emption argument has been rejected either explicitly or implicitly by other courts, there is no well-considered opinion on the subject.

Historically, courts have interpreted § 1823(e) and *D'Oench* together, drawing from a common body of caselaw. Courts have routinely concluded that both would apply, and thus have found no need to distinguish the two. *See RTC v. Murray*, 935 F.2d 89, 93 n.3 (5th Cir. 1991); *Royal Bank of Canada v. FDIC*, 733 F.Supp. 1091, 1095 (N.D.Tex. 1990) (citing cases). In most situations, such interpretation of two legal provisions does not pose a significant problem. In the context of federal common law, however, this sort of interpretation is an anomaly. If a statutory provision is exactly co-extensive with a doctrine of federal common law, the statute controls and the federal common law vanishes because there is no longer a need for it. Only if the common law doctrine is not co-extensive with the statute and the statute does not pre-empt it could the doctrine retain any vitality.

Some courts have called § 1823(e), the "statutory analogue" of *D'Oench*. *See FDIC v. Bertling*, 751 F.Supp. 1235, 1237 n.1 (E.D.Tex. 1990). Courts have often stated that § 1823(e) "codified" *D'Oench*. *See, e.g., Bowen v. FDIC*, 915 F.2d 1013, 1015 n.3 (5th Cir. 1990); *Shuler v. RTC*, 757 F.Supp. 761, 764 (S.D.Miss. 1991). The distinction that these courts make between codification and pre-emption is by no means clear. Their continued use of *D'Oench* in conjunction with the statute, both pre- and post- FIRREA, suggests that *D'Oench* retains some independent vitality.[12] *See Reding v. FDIC*, 942 F.2d 1254, 1259 (8th Cir. 1991) (holding that *D'Oench* and § 1823(e) provide independent grounds to bar a party's defense); *FDIC v. Orrill*, 771 F.Supp. 777 (E.D.La. 1991) (same); *see also* Stillman, *Enforcing Agreements with failed Depository Institutions: A Battle with the FDIC/RTC Superpowers*, 47 Bus. Law. 99., 101 - 02 n.19 (1991). Still other courts have left the question open by calling § 1823(e) a "partial codification" of *D'Oench*. *See, e.g. Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 749 F.Supp. 635, 641 (D.N.J. 1990).

Plaintiff argues that the passage of § 1823(e) in 1950 did not pre-empt *D'Oench*, but that the enactment for FIRREA in 1989 did. This argument is actually two-fold. First plaintiff argues that FIRREA was intended to be comprehensive — to essentially wipe out all federal common law in the field of banking regulation. Plaintiff refers the court to the general statements of various members of Congress who touted FIRREA as a comprehensive overhaul of the financial regulatory

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[12] There is no doubt that *D'Oench* was applied to entities, such as FDIC-receiver and FSLIC, that were not protected by § 1823(e) before FIRREA. Courts, however, continue to apply *D'Oench* to FDIC-Corporate, despite the fact that § 1823(e) has always expressly applied to the FDIC in this capacity. *See, e.g., FDIC v. Investors Assocs. X. Ltd.*, 775 F.2d 152 (6th Cir. 1985).

system.[13] The court cannot ignore such statements, although they are commonly made by members of Congress concerning high visibility pieces of legislation, because Congress' view of a program's comprehensiveness is relevant to the pre-emption inquiry. *See City of Milwaukee*, 451 U.S. at 317 - 19. No one disagrees that Congress intended FIRREA to radically strengthen the regulatory authority of certain government agencies and to reform the banking industry. There is no evidence, however, that Congress intended to sweep away all vestiges of what remained from the previous system. Indeed, Congress re-enacted certain provisions, such as § 1823(e), demonstrating that some (indeed a great deal) of the prior system should remain. Further, Congress is always presumed to be aware of a prevailing judicial interpretation of an existing statute. When, as in the case of FIRREA and § 1823(e), Congress incorporates an old provision into a new statutory scheme, the re-enacted provision is generally assumed to retain its judicially-created gloss, unless otherwise specified. *See Lorillard v. Pons*, 434 U.S. 575 (1978). Congress is presumed to have understood the relationship between *D'Oench* and § 1823(e) when it enacted FIRREA. Admittedly, *D'Oench* has grown to such tremendous proportions that "gloss" may be a misnomer. Yet the very "startling" nature of *D'Oench*'s severity, *see Bowen*, 915 F.2d at 1015, makes Congress' silence curious. The very fact that § 1823(e) was re-enacted without substantial change by FIRREA (and without comment by Congress) contradicts plaintiff's theory that FIRREA occupied the field to the exclusion of *D'Oench*.

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[13] In appendix D to plaintiff's memorandum in opposition to the FDIC's motion to dismiss, plaintiff cites numerous examples of members of Congress using the term "comprehensive" in reference to FIRREA. *See, e.g.*, 135 Cong. Rec. H2563 (daily ed. June 14, 1989) (quoting Rep. Ridge stating that FIRREA is "bold and comprehensive" and "the most important legislation concerning our financial system since Congress created this Nation's financial safety net with the Federal Reserve Act of 1913 and the Banking Act of 1933").

Nonetheless, while the court rejects plaintiff's "macro"-theory — that FIRREA obliterates all federal common law in the field of banking regulation, plaintiff's argument also proceeds on another level. Plaintiff argues that the specific statutory amendments made by FIRREA concerning the application of § 1823(e) protection make clear that *D'Oench* was to be completely pre-empted. The legislative history on this issue is scant. Section 1823(e), originally enacted in 1950, was incorporated by FIRREA without a significant modification, although it was extended to apply to both FDIC-corporate and FDIC as receiver. *See* 12 U.S.C. § 1823(e) (1991); 12 U.S.C. § 1821(d) (9) (A) (1991). The protection of § 1823(e) was also extended to the RTC, *see* 12 U.S.C. § 1441a(b) (4) (1991), and bridge banks, *see* 12 U.S.C. § 1821(n) (4) (I) (i) - (iv) (1991). Plaintiff claims that these statutory amendments are directly related to the line of cases which expanded *D'Oench* to situations where the original § 1823(e) did not apply. *See Beighley v. FDIC*, 868 F.2d 776, 783 - 84 (5th Cir. 1989) (extending protection to FDIC-receiver); *Beli & Murphy & Assocs., Inc. v. Interfirst Bank Gateway*, 894 F.2d 750, 754 - 55 (5th Cir. 1990) (extending protection to bridge banks); *Andrew D. Taylor Trust V. Security Trust Fed. Savings & Loan Ass'n*, 844 F.2d 337, 342 (6th Cir. 1988) (extending protection to FSLIC). According to plaintiff, these amendments demonstrate that Congress was clearly aware of the developments of the federal common law and, further, sought to address them in FIRREA by completely codifying *D'Oench*. *See City of Milwaukee*, 451 U.S. at 314. Having incorporated this judge-made common law into a statute, Congress signalled that *D'Oench* was no longer necessary.

While Congress may have been responsive to the federal common law in its FIRREA reforms, such awareness does not necessarily demonstrate that Congress intended to obliterate *D'Oench*. FIRREA extends the reach of § 1823(e) to different entities, but it left the *substantive* protection of the statute

virtually untouched.[14] Thus FIRREA says nothing about the substantive reach of *D'Oench* or about the interplay between *D'Oench* and § 1823(e). The court agrees with plaintiff that, in holding that § 1823(e)-type protection extends to the RTC, to bridge banks or to the FDIC-receiver, a federal court must ground its decision in the various statutory provisions, rather than in *D'Oench*; because the statute covers these areas, the interstices have been filled and there is no longer a need for federal common law, such as *D'Oench*.[15] However, none of this suggests that Congress intended to remove any additional substantive protection which *D'Oench* may provide beyond the reach of § 1823(e).

The question thus becomes whether § 1823(e) pre-empted *D'Oench* in 1950 (rather than in 1989) and whether *D'Oench* provides substantive protection more expansive that § 1823(e). Section 1823(e) was inextricably linked with *D'Oench* for over forty years. Because *D'Oench* is common law, and hence subordinate to statute, a statute that is coextensive with common law provision should supplant the common law. Despite the fact that courts have generally construed *D'Oench* and § 1823(e) together, the continuing vitality of *D'Oench* throughout these years counsels against pre-emption. Further, some courts have articulated differences in the scope of protection provided by *D'Oench* and the statute. *See e.g.*, *Vernon v. RTC*, 907 F.2d 1101, 1106 (11th Cir.) 1990);[16] *Tuxedo Beach Club Corp. v. Federal Sav. Bank*, 749 F.Supp. 635, 642 (D.N.J. 1990);

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[14] The only marginally "substantive" change amended the words "right, title or interest" to "interest." 12 U.S.C. § 1823(e) (1991).

[15] The Supreme Court in *Langley*, while citing the *D'Oench* case, grounded its decision in § 1823(e) only, as the statute clearly applied to the case.

[16] The court notes that *Vernon*, a case whose logic the plaintiff often cites for their own theory, supports the proposition that *D'Oench* extends beyond the bounds of § 1823(e).

Castleglen, Inc. v. Commonwealth Sav. Ass'n, 728 F.Supp. 656, 662 (D. Utah 1989); *see also* Stillman, *supra*, at p.109-110 & n.13; Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. Cal L. Rev 253, 270 - 271 (1988). The court is persuaded by these cases and commentators, at least to the extent that they draw distinctions between *D'Oench* and § 1823(e).

The court holds that Congress did not intend for *D'Oench* to be totally preempted by FIRREA; rather, FIRREA partially codified *D'Oench*'s common law regime. See *Tuxedo Beach Club*, 749 F.Supp. at 641. By holding that *D'Oench* was not pre-empted by FIRREA, this simply agrees with all of the federal courts who have at least considered this issue implicitly. While both *D'Oench* and the statutory provisions protect similar interests of the government, each is capable of a somewhat independent interpretation, as will be discussed below, so that they do not completely overlap. It is this added protection given by *D'Oench*, which Congress has neither codified nor demonstrated any intent to repudiate, that remains viable in the interstices of FIRREA. *D'Oench* after all is based on a policy that the Supreme Court found in the Federal Reserve Act. *See D'Oench*, 315 U.S. at 456 - 457. That policy, to protect the government against secret agreements, is just as valid today, and indeed is probably more valid given the recent savings and loan disaster. The passage of § 1823(e) in 1950 further revealed and reinforced that policy by providing a specific statutory scheme to address some of the concerns raised by *D'Oench*. The policy revealed in the Federal Reserve Act and emphasized by § 1823(e) that applies to situations that fall both inside and outside the scope of § 1823(e). It is to these situations outside of § 1823(e) that *D'Oench* applies and courts have retained *D'Oench* (with Congress' silence and approval[17]) to deal with such situa-

[17] The court does not believe that Congress' silence can always be so readily interpreted. Courts must be cautious when reading something into

tions; In this sense, *D'Oench* can best be described as a safety net which Congress has left to insure that the specific wording of the statute does not prevent the true application of Congress' policies. Indeed, one of the principal purposes behind FIRREA's amendment of § 1823(e) and creation of § 1821(d)(9)(A) was to extend further protection to the federal government when stepping in for failed financial institutions. It seems at odds with this clearly expressed intent that Congress would, without a word, have removed this long-standing doctrine which served exactly that purpose.

B. The Scope of *D'Oench*, § 1823(e), and § 1821(d)(9)

i. The policies behind *D'Oench* and §§ 1823(e) and 1821 (d)(9)

Having held that *D'Oench* remains a viable common-law doctrine, the court must now define the boundaries set by the statute and then discuss the place that *D'Oench* serves to fill in gaps left by FIRREA and to further the federal policy to protect the FDIC from certain types of claims. The vague contours of both *D'Oench* and the statutory sections, however, cannot be understood at all without some discussion of the policy that underlies them. The policy considerations that led to the birth of *D'Oench* subsequently resulted in the congressional enactment § 1823(e). Admittedly, the words of the statute provide the best guides to interpretations for § 1823(e) and § 1821(d)(9)(A), but these are by no means unambiguous; case law interpreting the statute has repeatedly focused on the purpose behind the statute. *See, e.g., FDIC v.*

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nothing. In this situation, where *D'Oench* has been constantly cited by federal courts and has flourished, where *D'Oench* enforces the same policies as the statute, and where Congress has simply re-enacted a statutory provision (§ 1823(e)) which is surrounded by such an important common law development, the court believes that Congress has shown its approval of *D'Oench*. Indeed, not only its silence, but also its affirmative re-enactment of § 1823(e) demonstrate Congress' approval.

Meyer, 755 F.Supp. 10, 14 (D.D.C. 1991); *Royal Bank of Canada v. FDIC*, 733 F. Supp. 1091, 1095 (N.D.Tex. 1990). *D'Oench*, moreover, is nothing more than the policies which created it. Only by understanding what the doctrine attempts to protect can *D'Oench* be given any meaning. Thus, the court must first lay out the policy considerations (and rhetoric) which have surrounded the application of both the doctrine and the statute. This discussion is especially crucial in a case such as this one which involves a transaction (buyer-seller of commercial paper) that is outside the traditional context (lender-borrower) for the application of *D'Oench* and § 1823(e). Plaintiff here argues that *D'Oench* and § 1823(e) have no application to transactions such as that between NBW and plaintiff, whereas the FDIC seeks to fit them into the parameters of a traditional *D'Oench* case. Thus the issues are not simply what the technical requirements of § 1823(e) and *D'Oench* are, but rather whether the court even needs to consider these requirements.

D'Oench itself cited a federal policy, revealed in the Federal Reserve Act, to protect the FDIC from misinterpretations concerning the assets of banks which it insures. *See D'Oench*, 315 U.S. at 456 - 57. Bank examiners must be able to rely on the books of the institution which they insure in order to make appropriate assessments of solvency. *D'Oench* sets forth the language which is repeated throughout subsequent *D'Oench* and § 1823(e) cases: "[t]he test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." *Id.* at 460. *Langley* reinforces that this policy undergirds both *D'Oench* and § 1823(e). *See Langley*, 484 U.S. at 91 - 92. Thus, a court examining whether a particular claim or defense is barred under these provisions must consider whether the transaction at issue — explicitly an "agreement" under the terms of the statute or an

"arrangement" under *D'Oench* — would tend to deceive bank examiners.

D'Oench and § 1823(e) also insure that creditors and depositors (as well as insurers) are favored over those who can protect themselves against harm. *See Langley*, 484 U.S. at 94; *Carico v. First Nat. Bank of Bogota*, 734 F. Supp. 768, 770 (E.D.Tex 1990). Whereas depositors and creditors have little control over how a bank uses their money and rarely have lawyers to help them structure their relationship to the bank, others, most particularly borrowers, generally rely on complex, written agreements that completely set forth their relationship to the bank. *D'Oench* and § 1823(e) implement a regime that places the risk on borrowers if they do not get all of the terms of their agreements in writing. *See Langley*, 484 U.S. at 94; *Fair v. NCNB Texas Nat. Bank*, 733 F. Supp. 1099, 1103 (N.D.Tex. 1990). Although most cases have focused on borrowers, some have extended this logic to bar *any* parties who could have protected themselves through an appropriate written agreement from asserting claims and defenses concerning that agreement. *See Carico*, 734 F.Supp. at 768. This policy rationale suggests two related inquiries for a court considering whether *D'Oench* and § 1823(e) have any application outside the traditional lender-borrower context. First, in a very generic sense, is the party adverse to the FDIC more like a borrower or a creditor/depositor?[18] If the latter, then *D'Oench* may simply not apply, though the expansion of *D'Oench* over the last forty years

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[18] At least two courts have made clear distinctions between situations involving the debts owed *to* a failed bank and "pure obligations" of the bank. *See Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990) (holding *D'Oench* inapplicable to claims by shareholders of the bank for misrepresentation as to the financial situation of the bank); *Agri Export Cooperative v. Universal Sav. Ass'n*, 767 F.Supp. 824, 832 (S.D.Tex. 1991) (holding *D'Oench* and § 1823(e) inapplicable to the bank's obligation to fund a letter of credit which was a "straightforward obligation" of the bank).

suggests that the inquiry may not be this simple. Second and more concretely, could the party have taken reasonable steps to protect themselves through some form of written agreement?[19] If the party is relying on an unwritten agreement for a claim or a defense, then either *D'Oench* or § 1823(e) probably applies.

The Supreme Court in *Langley* set forth an additional rationale for § 1823(e). The court held that, not only was § 1823(e) intended to permit bank examiner to rely on the bank's books, as *D'Oench* stated, but also that § 1823(e) would insure that bank officers would give "mature consideration" to "unusual loan transactions." *Langley*, 484 U.S. at 92. By requiring the approval of the appropriate committees and contemporaneous recording, § 1823(e) would help prevent the insertion of fraudulent terms which could subsequently be used to the detriment of the FDIC. *See id.*

ii. The interpretation of § 1823(e)

Plaintiff focuses the court's attention on two crucial words in § 1823(e) — "agreement" and "asset." Plaintiff asks the court to narrowly interpret the meaning of both of these words, arguing that the FDIC's construction would virtually be limitless. The FDIC asks the court to continue down the path begun by the Supreme Court in *Langley* by interpreting "agreement" very broadly and to construe "asset" to refer to anything which affects the financial situation of the FDIC as receiver for a failed bank.

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[19] The Ninth Circuit established an "innocent borrower" exception to the *D'Oench* doctrine in *FDIC v. Meo*, 505 F.2d 790 (9th Cir. 1974). In that case, the court held that the borrower was innocent of any wrongdoing or even negligence and had no part in a scheme that would deceive the bank examiners. Although courts may have avoided adopting this exception because of its potentially broad applicability, the question of whether a party could have done anything to protect himself is similar to the inquiry in *Meo*. One could also read *Vernon* and *Agri Export Cooperative* in the same fashion.

a. "Agreement"

There is no question that *Langley* expands the definition of "agreement" in § 1823(e) beyond the traditional meaning of the word. AFSCME seeks to confine "Langley" to its facts by limiting the term "agreement" to its traditional meaning *plus* affirmative misrepresentations made as a condition to performance of another agreement. The FDIC cites the substantial case law in the wake of *Langley* that expands the definition of "agreement" to include misrepresentations of all kinds and material omissions. *See FDIC v. Bell*, 892 F.2d 64, 65 (10th Cir. 1989); *FDIC v. Sullivan*, 744 F.Supp. 239, 241 - 42 (D.Colo. 1990). The court is persuaded the weight of authority that interprets *Langley* broadly. If a party cannot assert fraudulent misrepresentations made by the bank, then it should not be able to win its case by describing these as material omissions. *See FDIC v. Bank of Virden*, 893 F.2d 139, 144 (7th Cir. 1990); *Bell*, 892 F. 2d at 67. Admittedly, this stretched the bounds of the term "agreement," but this interpretation seems to flow directly from the Supreme Court's opinion in *Langley*. Material omissions, after all, are just as much inducements to sign agreement as are misrepresentations and *Langley* clearly contemplates the bar of any sort of fraudulent inducement claim or defense, based on an unwritten warranty, against the FDIC. In addition, permitting suit on omissions would practically swallow the *Langley* rule since parties can generally turn a misrepresentation into an omission by means of artful pleading. The regime that *Langley* creates is quite harsh — plaintiff not only has a responsibility to record all representations, but also must affirmatively ask questions and record the answers (so that there are no omissions) if the party intends to rely on these omissions for a lawsuit. Thus the term "agreement" in § 1823(e) and § 1821 (d)(9)(A) includes not only misrepresentations that are conditions to performance but also omissions.

b. "Asset"

Plaintiff argues that "asset" has a very specific meaning in § 1823(e). Because loans are the principal assets of banks, plaintiff encourages the court to interpret "asset" to mean "loan." In support of this argument, plaintiff notes the writing requirement if subsections (3) of the statute which identifies the bank board of directors or the loan committee as the appropriate bodies who must consider an "agreement." In addition, plaintiff reminds the court that the Supreme Court in *Langley* stated that one of the policy justifications behind § 1823(e) was to force bank officials to give careful consideration to lending decisions. Plaintiff also argues that the language of the *Langley* opinion carefully contemplates the "asset" refers to a bank loan.

The FDIC does not actually attack this interpretation of the word "asset." Their memoranda gloss over the issue, arguing that § 1823(e) applies, and that, even if it does not, that *D'Oench* does. Nor does the FDIC suggest that there are any limits on their interpretation of "asset." Plaintiff warns that a vast interpretation of "asset" would mean that no contract for supplies or services to a bank could be a basis for recovery because none of these agreements would be recorded in writing under the strict requirements of § 1823(e). At least on commentator has, however, suggested that this expansive interpretation is the correct one. *See* Stillman, *supra*, at 109.

The courts who have faced cases that involve an interpretation of the word "asset" in § 1823(e) have generally preferred to ignore the statute and found their holdings on the more flexible *D'Oench* doctrine. *See e.g*, *Hall v. FDIC*, 920 F.2d 334, 339, (6th Cir. 1990) (stating that *D'Oench* protects FDIC from loss of "negative assets"); *Castleglen, Inc. v. Commonwealth Sav. Ass'n*, 728 F.Supp. 656, 671 (D.Utah 1989) (applying *D'Oench* to any claim that would "diminish the value of the assets" or "increase the liabilities" held by the receiver). Other courts have held that the FDIC or other institutions must actually

come into possession of the asset for § 1823(e) to apply; if a plaintiff has already won a judgement against the bank, *see Grubb v. FDIC*, 868 F.2d 1151 (10th Cir. 1989), or has already paid off a note, *see Commerce Fed. Sav. Bank v. FDIC*, 872 F.2d 1240 (6th Cir. 1989), then the FDIC does not "acquire" the asset under the statute. *See FDIC v. Bracero & Rivera, Inc.*, 895 F.2d 824, 830 (1st Cir. 1990) (holding that the asset requirement of § 1823(e) is not satisfied if "acts independent of the alleged secret agreement" invalidate the note). In one of the more reasoned decisions, a district court in Texas held that § 1823(e) requires that the FDIC obtain an interest in a "particular, identifiable" asset. *Agri Export Cooperative v. Universal Sav. Ass'n*, 767 F. Supp. 824, 833 (S.D.Tex. 1991).

The court is persuaded, for the most part, by plaintiff's interpretation of "asset" for several reasons. The language of the statute suggests that Congress was referring to traditional loan transactions; subsection (3) specifically refers to the loan committee and the other subsections describe a process that might be followed in the course of making a normal loan. The writing requirements, which are stringent, will almost never be satisfied by investors, such a plaintiff, creditors, or tort claimants. There is no hint in any of Congress' pronouncements that such individuals should be disfavored. Indeed, one of the traditional rationales for the *D'Oench* doctrine is to insure that these individuals are favored when compared to borrowers. *See Langley*, 484 U.S. at 94; *Kilpatrick v. Riddle*, 907 F.2d 1523, 1529 (5th Cir. 1990). Nor does the court find an intent by Congress to radically alter the day-to-day transactions of the banking industry by requiring all customers and business associates of a bank to demand that all issues and agreements be placed before the board of directors (or the loan committee). *See Agri Export Cooperative*, 767 F.Supp. at 834.

Further, the court reads the Supreme Court's opinion in *Langley* to distinguish between an asset and a liability. *See*

Langley, 484 U.S. at 91 (describing the statutory provisions which permit the FDIC to finance the "purchase of [] assets (and assumption of [] liabilities)"). The language of the entire opinion suggests that the word "asset" has particular meaning and is not simply a stand-in for "money." Plaintiff's definition, however, of the word "asset" as "bank loan" is too narrow; accepting this definition would reject case law from virtually every jurisdiction. Thus, it is appropriate that "asset" should also refer to loan participation agreements, promises to make future loans, and sales of property or securities which involve the making of a note from an individual or entity to the bank. The court does not need to decide the full scope of the banking activities which might fall into the term "asset." Under no circumstances, however, should the term be interpreted so broadly as to encompass any liability or other existing condition which affects the financial condition of the receivership.[20]

This interpretation also seems proper because it ties § 1823(e) to the original *D'Oench* case to some degree. No authority disputes that the original passage of § 1823(e) was intended to provide statutory protection akin to *D'Oench*. The provision was enacted in 1950, long before *D'Oench* began its ungainly growth. Under this interpretation, Congress codified the original *D'Oench* decision, focusing on its particular facts through the language of the statute ("agreement" and "asset"). The federal policy revealed in *D'Oench* is, however, somewhat

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[20] Further support for the court's conclusion derives from counsel for the FDIC, who appears to have conceded this point at oral argument in the following exchange:

Court: ...On that you agree that general money is not an asset?

Counsel We would interpret that as requiring, at least to the extent it refers to an "asset" that there be a specific asset; such as, again, a mortgage, a promissory note, or actual real estate.

Transcript of January 28, 1992, Hearing at 20.

greater in scope. Subsequent decisions have demonstrated this by expanding *D'Oench*, which, because it is federal common law, is far more flexible than statutory enactments. The court will discuss the extent of the *D'Oench* doctrine below, but first must deal with Congress' enactment of § 1821(d)(9)(A), which adds to the statutory protection accorded the FDIC.

iii. § 1821(d)(9)(A) and its relationship to § 1823(e)

Post-FIRREA courts barring claims against the FDIC have almost exclusively based their decisions on § 1823(e) and *D'Oench*. Section 1821(d)(9)(A), a completely new provision added by FIRREA, explicitly incorporates the requirements of § of § 1823(e), but its meaning is by no means clear. AFSCME and the FDIC suggest competing interpretations of § 1821(d)(9), neither of which is entirely satisfactory. In essence, the court must choose the interpretation which assumes the least problematic drafting error on the part of Congress. Plaintiff argues that, under its plain language, §1821(d)(9)(A) incorporates all of the requirements of § 1823(e), including the "asset" requirement; such an interpretation would, however, make the two sections substantially similar in meaning. The FDIC argues that the two sections could not have the same meaning, that § 1821(d)(9)(A) should be interpreted to extend § 1823(e)'s protection to any agreement, whether or not an interest in an asset is at stake. Under this theory, the court would have to ignore the "asset" language in subsection (2) of § 1823(e) when interpreting § 1821(d)(9)(A). The legislative history of this section is virtually non-existent, so the choice is between the lesser of two evils.

There is no particular hierarchy in statutory interpretation to aid the court in selecting which error is preferable. Neither option — interpreting certain words out of existence or interpreting two provisions as nearly identical — is desired. The FDIC's proposed interpretation appears, however, to suffer from both problems. Not only would the FDIC's theory force

the court to ignore § 1823(d)(9)(A)'s reference to an "asset," but it would also make other sections of FIRREA superfluous. As noted previously, the average creditor of a failed bank could not satisfy the recording requirements of § 1823(e), which are incorporated into § 1821(d)(9)(A). There is no evidence that Congress desired such a result, and indeed several other provisions of FIRREA suggest that Congress intended a different result. Section § 1821(e) sets forth procedures for the FDIC's dealings with creditors and permits the FDIC to disaffirm contracts by paying actual damages. Under the FDIC's construction of § 1821(D)(9)(A), there would be no need for FDIC to have the right to disaffirm because § 1821(d)(9)(A) would bar any claims made against the FDIC based on such contracts.[21]

Thus the court prefers the plaintiff's interpretation,[22] despite the fact that it makes § 1821(d)(9)(A) into a somewhat repetitive provision; if nothing else, it makes clear that § 1823(e)'s protection extends to the FDIC in any capacity. In addition, the court notes that § 1821(d)(9)(A) states that an agreement which does not meet the requirements of § 1823(e) "shall not form the basis of, or substantially comprise," a claim against the FDIC. This language suggests an attempt by Con-

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[21] As at least one other court has noted, FSLIC (and also FDIC) was created, in part, to provide for the orderly settlement of claims against the failed bank. *See Vernon v. RTC*, 907 F.2d 1101, 1108 (11th Cir. 1990). The FDIC's interpretation of § 1821(d)(9)(A) is somewhat incongruous with this mission.

[22] Indeed, were the court to accept the FDIC's interpretation of § 1821(d)(9)(A), it would be much more receptive to the pre-emption argument. Interpreting § 1821(d)(9)(A) as an expansive protection of the FDIC would make *D'Oench* virtually non-existent because the statute would then protect the FDIC from almost any claim. While such an interpretation would curb the amount of common law that judges would be required to create, the court simply does not believe that the plain language of the provision permits such a broad reading.

Congress to codify the Supreme Court's holding in *Langley* by making clear that a party need not sue expressly on the agreement to be barred. Torts and other claims which center around an unrecorded agreement are also barred, even though the plaintiff is not asserting the agreement itself explicitly against the FDIC. This interpretation is particularly plausible because § 1821 (d)(9)(A) was enacted as part of FIRREA's provisions regarding the FDIC's role as receiver, i.e. when FDIC would be defending against affirmative claims.

iv. The *D'Oench* Doctrine

Having decided that *D'Oench* was not pre-empted by FIRREA and having lain out the groundwork for an interpretation of the statute, the sole remaining issue is the exact extent of *D'Oench*'s common law regime. As already noted, courts have historically construed § 1823(e) and *D'Oench* together, often holding, in the same breath, that both bar certain claims; once again, this manner of interpretation is flawed because federal common law, by its nature, ceases to exist when a statute replaces it. The only manifestations of *D'Oench* which still exist are those which are not covered by the statute. The FDIC argues that *D'Oench* is distinct from § 1823(e) because it has no "asset" requirement, and thus could apply to any claim or defense which could affect the financial status of the FDIC in any capacity. AFSCME would have the court interpret *D'Oench* as narrowly as the statute; this argument would render *D'Oench* functionally pre-empted, a result which the court has already rejected.

The majority of the courts who have considered the matter have determined that *D'Oench* may be applied outside the lender-borrower context. *See Hall v. FDIC*, 920 F.2d 334 (6th Cir. 1990); *McCaugherty v. Siffermann*, 772 F.Supp. 1128 (N.D.Cal. 1991); *Royal Bank of Canada v. FDIC*, 733 F.Supp. 1091 (N.D.Tex. 1990). This view indicates that *D'Oench* has no asset requirement. *See Bell & Murphy Assocs., Inc. v. Interfirst*

Bank Gateway, 894 F. 2d 750, 753 (5th Cir. 1990). Two courts, however, have forbidden the application of *D'Oench* to claims involving a pure obligation of the bank, rather than an obligation of a debtor to the bank. *See Vernon v. RTC*, 907 F.2d 1101 (11th Cir. 1990); *Agri Export Cooperative v. Universal Sav. Ass'n*, 767 F.Supp. 824 (S.D.Tex. 1991). Other courts have suggested that *D'Oench* may apply against a borrower even when there is no agreement. *See McCaugherty*; *Tuxedo Beach Club*, 749 F.Supp. 642. In attempting to distinguish *D'Oench* and § 1823(e), one district judge concluded that § 1823(e) was both broader and narrower than *D'Oench*: "It is broader in that it applies to *any* agreement, whether or not it was secret and regardless of the maker's participation in a scheme; it is narrower in that it applies *only* to agreements and not to other defenses the borrower might raise." *Id.* (emphasis in original).

As the court has previously stated, *D'Oench* can best be described as a safety net; § 1823(e) and § 1821(d)(9)(A) are Congress's attempts to codify, at least in part, the policy represented by *D'Oench*, but *D'Oench* remains to cover situations which fall through the cracks. For example, an investor goes to a bank and asks the bank to place money in government securities that pay a fixed rate of interest; at the same time however, he makes a secret side agreement that states that the bank will actually pay him double the rate of interest. When the bank fails and the FDIC enters as receiver, the investor sues for his excess interest. Under the plaintiff's and this court's reading of § 1823(e), the statute would not apply because the asset requirement would not be satisfied. Yet the same equitable principle that generated the original *D'Oench* case and Congress' passage of § 1823(e) demands that the investor not be able to assert this agreement against the FDIC. *D'Oench* must apply to this situation and thus is not bound by the asset requirement.

The *D'Oench* doctrine as it now exists embodies the policies discussed above, though is not bound by the "asset" requirements or the particular writing requirements of § 1823(e).[23] The court disagrees, however, with the courts that have held the *D'Oench* can apply when there is no agreement. To so loose *D'Oench* from its moorings by removing its relationship to an agreement seems a radical step that is contrary to virtually all of the caselaw and the policies surrounding *D'Oench*; *D'Oench* cases have always revolved around secret side agreements. It should be noted that the FDIC does not even argue this point, although they cite frequently to *McCaugherty*[24] Particularly given the extremely broad definition of "agreement" which *Langley* mandates for § 1823(e), this court is not prepared to abandon *D'Oench*'s connection to some sort of agreement or "arrangement" which would tend to deceive bank examiners. Indeed it is the language of the original *D'Oench*

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[23] That *D'Oench* does not include the stringent writing requirements of § 1823(e) is implicit in the case law. Courts have generally avoided stating what sort of writing requirement *D'Oench* includes, but their language indicates that, when *D'Oench* applies, but § 1823(e) does not, a less stringent writing requirement should be applied. *See, e.g., Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989) (requiring that the writing be "clearly evidenced in the bank's records"; *Fair v. NCNB Texas Nat. Bank*, 733 F.Supp. 1099, 1105 (N.D. Tex. 1990) (applying an "objective standard" as to what would apprise a bank examiner of an agreement). This result is appropriate in the light of the flexible nature of federal common law, such as *D'Oench*, and the court's holding that the strict requirements of § 1823(e) are inappropriate for transactions outside the loan context. As the parties have not briefed this issue fully and the court need not decide it at this time, the court will decline to elaborate further. The court notes, however, that contracts for services, which would not fall under § 1823(e), could reasonably survive *D'Oench*'s less stringent writing requirement if the contract were in writing and recorded in the bank's records.

[24] Both *McCaugherty* and *Tuxedo Beach* involved situations where there existed agreements within the meaning of *Langley*.

case which is instructive on this point: "[i]t would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." *D'Oench*, 315 U.S. at 460. There must be some sort of scheme or arrangement, which suggests an "agreement" within the terms defined by *Langley*. As one circuit explained it, "when the failure to put in writing what was said orally is the gravamen of the objection to the bank's conduct," *D'Oench* applies. *FDIC v. State Bank of Virden*, 893 F.2d 139, 144 (7th Cir. 1990); *Royal Bank*, 733 F.Supp. at 1096 n.9. This "test" reveals the equitable principle that stands behind the *D'Oench* doctrine. *D'Oench* determines, as between two "innocents" (the FDIC and the "wronged" bank customer) who should bear the cost of the failed bank's wrongs. If the customer bears the slightest blame — by failing to protect himself by getting an agreement in writing, then the scale tips in favor of the FDIC and *D'Oench* bars the claim or defense.

This discussion does not make the application of *D'Oench* to plaintiff's claims significantly easier. *D'Oench* after all is based on a federal policy and plaintiff's claims must be examined in light of the policies behind *D'Oench* and the questions which these policies suggest. Both plaintiff and the FDIC (and the majority of other courts) agree that plaintiff's complaint must be examined by claim to determine whether *D'Oench* bars each individual claim. It is to this inquiry that the court now turns.

V. AFSCME's Claims

Having extensively discussed the legal issues in the abstract, the court can dispense with the FDIC's motions to dismiss in a more summary fashion. Under the court's interpretation of FIRREA, neither § 1823(e) nor § 1821(d) (9) (A) apply to AFSCME's claims. AFSCME's claims do not refer to a loan or other specific, identifiable asset, nor has the court found

any persuasive authority that expands the definition of "asset" under § 1823(e) to include money funnelled through the bank for investment purposes. The stringent writing requirements of § 1823(e) indicate that AFSCME's purchase of commercial paper from NBW was not the sort that was intended to be regulated by § 1823(e) or § 1821(d) (9) (A). Individuals and entities who use a bank as a conduit for their investments generally do not seek approval of the board of directors or the loan committee; such a requirement is burdensome and contrary to what this court perceives to have been Congress' intent. In addition, the Supreme Court's interpretation of § 1823(e) in *Langley* clearly did not anticipate the result recommended by the FDIC. Thus, § 1823(e) and § 1821(d) (9) (A) are not applicable to any of AFSCME's claims because none of the claims involve an "asset."[25]

Nonetheless, the *D'Oench* doctrine may still bar some or all of AFSCME's claims.[26] As discussed above *D'Oench* is a principle of equitable estoppel that focuses on an arrangement which would tend to deceive bank examiners and that is not restricted by the "asset" requirement. AFSCME's claims include fraud, misrepresentation, breach of fiduciary duty, and various securities law violations. The court will consider the causes of action claim by claim, as each has its own peculiarities.

A. Count I — Violation of §§ 5 and 12(1) of the Securities Act of 1933

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[25] In light of the court's ruling that § 1821(d) (9) (A) contains an "asset" requirement, counsel for the FDIC appears to concede that neither statutory provision applies to AFSCME's claims. "In fact, we are not dealing with an asset at all. We are, in fact, dealing with a contingent liability." Transcript of January 28, 1992, Hearing at 9.

[26] Indeed, were the court to dispense with the asset requirement in § 1821(d) (9) (A) or to interpret "asset" to mean anything which would affect the FDIC's financial situation, the provision would not encompass a greater array of claims than the court's interpretation of *D'Oench*.

Plaintiff alleges that NBW violated the Securities Act of 1933 by selling WBC commercial paper that was unregistered and of less than prime quality. Under plaintiff's theory, such sales violate § 5 and § 12(1) of the Act. Plaintiff argues that this federal statute establishes a strict liability offense that plaintiff need not prove through the use of an agreement which might be barred by *D'Oench* or FIRREA. Further, plaintiff argues, the policies of the securities' laws would be undermined if the FDIC, when stepping in for a failed bank, were immune from such suits. The FDIC responds that plaintiff's reliance on § 12(1) is simply another clever attempt to fabricate a claim based on an agreement not reflected in the bank's records. FDIC argues that plaintiff instead should pursue (as they currently are) a remedy against the individual officers of NBW who are accused of perpetrating this violation. The FDIC also notes that courts have commonly rejected attempts to base claims against the FDIC on state and federal securities laws. *See Kilpatrick v. Riddle*, 907 F.2d 1523 (5th Cir. 1990). Nonetheless, the court knows of no case where a court has ruled on a § 12(1) claim. All other cases have involved material misrepresentations and fraud as proscribed by § 10b-5 of the Securities Exchange Act of 1934 and other similar provisions. *See, e.g., id.*; *FDIC v. Investors Assocs. X. Ltd.*, 775 F.2d 152 (6th Cir. 1985).

Under § 12(1) of the Securities Act of 1933, codified at 15 U.S.C. § 771, "[a]ny person — offers or sells a security in violation of section 77e [§ 5 of the Securities Act of 1933] of this title, . . . shall be liable to the person purchasing such security from him . . . ." Section 5, codified at 15 U.S.C. § 77e, requires a seller of commercial paper to register the security unless the commercial paper is of a sufficiently high grade to be termed "prime" quality. Plaintiff alleges that WBC commercial paper was not of prime quality and was also unregistered, thus creating a violation of § 5 and permitting recovery under § 12(1). Plaintiffs emphasize that the liability derives not from any

agreement, but rather directly by operation of a strict liability statute.

Generally a party is not barred by *D'Oench* if they are asserting an independent legal obligation which does not arise from an agreement. *See Patterson v. FDIC*, 918 F.2d 540, 543 (5th Cir. 1990) (holding that Homestead right under Texas state constitution exists independent of any agreement by the parties); *In Re Howard*, 65 B.R. 498 (Bankr.W.D.Tex. 1986) (same); *but see Union Fed. Bank v. Minvard*, 919 F.2d 335, 336 (5th Cir. 1990) (holding that appeal to usury laws did not bar the bank's *D'Oench* defense.) Such a result appears appropriate in the light of the policies surrounding *D'Oench*. *D'Oench* protects the FDIC from secret side agreements or any arrangement in which plaintiff takes part that would tend to deceive bank examiners. When the act being sued upon has no connection to an agreement, but rather involves an independent basis for liability, *D'Oench* is not implicated. As previously stated, *D'Oench* applies when the gravamen of the FDIC's assertion is the failure to get an agreement in writing. *See FDIC v. State Bank of Virden*, 893 F.2d 139, 144 (7th Cir. 1990).

Here AFSCME's § 12(1) claim is not based on an "agreement" of any kind, even under the generous terms of *Langley* or any other reasonable interpretation of *D'Oench*. NBW's liability results from the sale of unregistered securities. Plaintiffs need not prove that there was any of other agreement between the parties, such as one that required NBW to purchase only low-risk securities with AFSCME funds.[27] Had NBW officials said absolutely nothing about what it was purchasing as an investment for plaintiff, AFSCME would still have the

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[27] There is no dispute that there was an agreement to purchase securities and that this agreement was recorded in the bank's books. The agreement which FDIC is asserting to be both unrecorded and the basis of AFSCME's claim is the agreement that NBW would purchase for AFSCME only low-risk securities. *See* Transcript of January 28, 1992, Hearing at 6.

exact same claim. Thus, even if the "asset" requirement were satisfied, neither § 1823(e) nor § 1821(d) (9) (A) would apply to the § 12(1) claim because it does not rest on an agreement.

The FDIC instead argues that "[p]laintiff cannot hold FDIC responsible for alleged liabilities of NBW relating to plaintiff's purchase of WBC commercial paper that were not reflected in the bank's books and records." Def.'s Mem. Supp. Mot. Dis. at 18. It is unclear, however, what has been alleged by plaintiff that is not reflected in the bank's records. The transaction — the sale of commercial paper — itself is in the bank's records and it is this transaction itself which creates the alleged liability — not any side agreement concerning the safety of the investment.[28] Even were the court to accept the FDIC's expansion of *D'Oench*,[29] the FDIC's argument falls under its own weight.

An analysis of the policies that generated *D'Oench* leads to the same result. Plaintiff did not lend themselves to a transaction that would tend to deceive bank examiners. All that plaintiff needs to prove is that the sale — which is on the bank's

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[28] To some extent, the FDIC's argument is that there was no way for bank regulators to know, from reading NBW's books, that the sale of WBC commercial paper was a violation of the securities laws; therefore, FDIC argues, they should not be liable. The real issues, however, is not whether the bank examiners could tell whether the bank's actions were illegal (or indeed whether the examiners knew what the law was), but rather, whether the factual predicate for the application of the law is established on the bank's books. For the § 12(1) claim, every fact that the plaintiff needs to prove is appropriately evidenced in the bank's records. That the plaintiff must prove certain facts from the books of the Washington Bancorporation or other entities to show that the commercial paper was a violation of § 12(1) is immaterial; under no circumstances can these facts be deemed part of an "agreement" involving the bank and AFSCME not can *D'Oench* apply to them in any way.

[29] Two courts have explicitly rejected such an expansion of *D'Oench*. *See Vernon v. RTC*, 907 F.2d 1101 (6th Cir. 1990); *Agri Export Cooperative v. Universal Sav. Ass'n*, 767 F.Supp. 824 (S.D.Tex. 1991).

books — was made.[30] The fact that the bank took an illegal action over which plaintiff had no control and which was totally independent of the plaintiff cannot be a basis for the application of *D'Oench*. The illegality of the commercial paper is the fact that creates the liability, not any act or agreement between the parties.[31] *D'Oench* is a principle of equitable estoppel which requires some passive (including negligent) or active act by a party whose claims and defenses are then barred. AFSCME could not have reasonably protected themselves. *D'Oench* bars claims when the plaintiff could have recorded some agreement or condition in the bank's records which it is now asserting as a sword or a shield against the FDIC. Under its theory in this case, the FDIC would have investors obtain a written agreement for each daily commercial paper transaction (recorded in the minutes of the bank's board of director) that stated that the bank would refrain from breaking the law. This result is not supportable in either law or common sense.[32]

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[30] Had the plaintiff agreed to purchase commercial paper which it knew was illegal, the court might reconsider its holding. Such an arrangement would be one in which the purchaser could protect himself and the action would tend to deceive banking authorities. The FDIC should not be liable for an absurd risk taken by an investor.

[31] *D'Oench* "is a rule of estoppel which . . . create[s] an irrefutable presumption in favor of the FDIC that the documents in the records of the bank on the date of insolvency represent the true agreement between the parties." *RSR Properties, Inc. v. FDIC*, 706 F.Supp. 524, 531 (W.D.Tex. 1989); *see also Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990) ("transactions not reflected on the bank's books do not appear on the judicial radar screen either"). Even under these expansive interpretations of *D'Oench*, plaintiff's § 12(1) claim survives; the true agreement of the parties — the sale of commercial paper — is on the bank's books and the sale itself creates the potential liability.

[32] Plaintiff rightly notes that the FDIC's interpretation of *D'Oench* wold turn it from a doctrine which states "*if* you have a claim based on an agreement, the agreement has to have been recorded in the bank's records" to one which states that a party "can't bring a claim *unless* it is based on a written recorded agreement." Pl. Mem. Opp. Mot. Dis. at 27 (emphasis in

The FDIC suggests that it would be an anomaly to hold them liable for the failed bank's technical violations of the securities laws, while they would not be liable for affirmative acts of fraud under *Langley*. First the court takes issue with the FDIC's characterization of the alleged violations as "technical." The registration requirements of the Securities Act of 1933 are designed to protect against the sale of just this sort of unsound commercial paper. Only prime quality paper, where default is not a significant threat, can be sold without registration. In addition, *D'Oench* creates preferences among those raising claims or defense against the FDIC, in part, according to how easy it would have been for the party to protect themselves; *D'Oench* may be harsh, but it is any equitable principle to help decide who should bear the cost — the FDIC or the party making the claim or defense.[33] When the equities are equal, i.e. when a party could have done nothing to protect itself, then *D'Oench* does not protect the FDIC. It is only when the party's failure to specify the terms of the agreement or the party's own affirmative acts that would mislead the bank examiners founds the claim or defense that the *D'Oench* doctrine bars their claim or defense. Similarly, § 1823(e) and § 1821(d) (9) (A) only bar a party's recovery or defense when the party asserts an agreement which does not fulfill the statute's requirements.

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original); *see also Vernon v. RTC*, 907 F.2d 1101, 1108 (11th Cir. 1990) (rejecting such an expansion).

[33] In essence, *D'Oench* ignores the wrongdoing of the failed bank and its officials in its calculus. *D'Oench* weighs the bank customer's actions against the FDIC; because the FDIC enters the situation subsequent to the transaction which is the subject of the suit, it is not likely to have acted inequitably. Any conduct by the customer — such as not recording a misrepresentation — will tip the scales in favor of the FDIC. In many ways, *D'Oench* is analogous to the traditional contributory negligence doctrine, where parties are forbidden any recovery if their acts contributed to the incident in even the slightest way.

The FDIC states in its memorandum in support of its motion to dismiss that "[i]mposition of liability upon FDIC for NBW's violation of the registration provisions of the securities laws would not serve the disclosure or deterrent goals of Section 12(1), and would interfere with the goal of protecting the national banking system." Def's Mem. Supp. Mot. Dis. at 19. The court cannot agree with his statement at all. Expansion of the *D'Oench* doctrine to a case such as this may encourage banks on the verge of financial ruin to sell worthless commercial paper to support their bank; admittedly, officers of such banks may be personally liable for these sales, but the expansion of *D'Oench* could tip the scales for a banker whose only focus is attempting to minimize such losses. More importantly, *D'Oench* might create inappropriate incentives for *bank regulator*, whose client, the FDIC, would no longer have a stake in pressuring banks to cease sales of worthless commercial paper. *See In Re Woodstaone Ltd. Partnership*, Bankr. No. 189-93578-352 (E.D.N.Y. Nov. 8, 1991) (describing the dangers to the national banking system of an expansive interpretation of *D'Oench*). Thus, because the court finds that AFSCME's § 12(1) claim does not rely an agreement or "arrangement" within the meaning of the *D'Oench* doctrine, the FDIC's motion to dismiss shall be denied with respect to Count I.

B. Count II — Violation of § 12(2) of the Securities Act of 1933
Count III — Violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Thereunder
Count V — False Representation
Count VI — Fraudulent Concealment
Count VII — Failure to Disclose
Count IX — Violation of District of Columbia Blue Sky Law

Plaintiff next alleges that officials of NBW misrepresented material facts and failed to disclose certain material facts on May 4, 1990, when AFSCME was considering purchasing commercial paper in the overnight market. Specifically, plaintiff allege that officials of NBW stated that an investment in commercial paper was as safe as the investments in government securities which AFSCME had previously engaged in; further, NBW officials never revealed that there were no supporting lines of credit for the commercial paper or that federal regulators had advised WBC and NBW to cease selling the commercial paper. The FDIC responds that *Langley v. FDIC*, 484 U.S. 86 (1987), completely dispose of these claims and forbids any party form using a failed bank's alleged oral misrepresentations from being asserted against the FDIC. According to FDIC's interpretation of *Langley*, the term agreement should be construed "broadly to include all condition and defenses," *FDIC v. Meyer*, 755 F.Supp. 10, 12 n.3 (D.D.C. 1991). Plaintiff replies that they are not asserting any agreement at all; rather, their case is focused on misrepresentations and omissions which are independent of an agreement.

Because of the broad interpretation of the term "agreement" which *Langley* mandates and the court's holding that an "arrangement" under *D'Oench* is similarly broad, the court must agree with the FDIC that these claims, which depend on misrepresentations and material omissions must be dismissed. In *Langley*, the petitioner stated that he need not repay a loan on a piece of property which he had purchased from the bank because the bank had made material misrepresentations of fact. The Supreme Court treated these misrepresentations as warranties or conditions to performance on the contract for the purchase of land and the loan. *See id.* at 94. Plaintiff's situation in this case is not dissimilar, despite the fact that plaintiff is an investor, not a borrower. Plaintiff accepted the representations of the bank as to the safety of the investment without recording the representation in a fashion that would make bank examiners

aware; the only difference between this plaintiff and the plaintiff in *Langley* is that the plaintiff there was a borrower, a difference which this court rejects in the context of the *D'Oench* doctrine. This oral agreement would tend to mislead bank examiners because there was no record of any guarantee that plaintiff's money would be invested in low-risk securities. Bank examiners would only see an investment and have no documentation for this contingent liability. Further, plaintiff could have protected itself by getting such a guarantee in writing and insuring that this writing was part of the bank's books. This failure to get the guarantee in writing triggers the application of *D'Oench*. *See FDIC v. State Bank*, 893 F.2d 139 (7th Cir. 1990); *Royal Bank of Bogata v. FDIC*, 733 F.Supp. 1091 (N.D.Tex 1990).

AFSCME argues that in no way can an omission be considered an "agreement." Plaintiff did not know the facts which NBW officials allegedly failed to tell them and thus could not have agreed or lent themselves to any arrangement that would tend to deceive bank examiners. The source, however, of NBW's duty to disclose appears to be an oral agreement not recorded in the bank's records. From the court's reading of AFSCME's complaint, these counts locate the duty in AFSCME's oral agreement with NBW concerning the relatively low-risk nature of AFSCME's investments.[34] Thus, the

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[34] Even if, as AFSCME alleged in its memoranda and at oral argument, the duty derives not from any side agreement concerning the safety of the investments, but rather by operation of law, the court believes that the logic of *Langley*, as applied to the *D'Oench* doctrine, would bar the claims. Plaintiff alleges a sale and an omission, which they claim does not include an agreement. Yet, the omissions and misrepresentations are, as *Langley* indicates, conditions to performance on that sale. Thus, the plaintiff here is in exactly the same position as the plaintiff in *Langley*. In *Langley*, the sale and loan were the agreement to which the misrepresentations were conditions to performance; in this case, the sale of commercial paper can be construed as the agreement (although the court does not read the complaint to allege

gravamen of the FDIC's defense is that AFSCME failed to get this agreement in writing. Because bank examiners could not have known about this duty which derived from an unrecorded agreement, the FDIC's motion to dismiss shall be granted with respect to these claims.

C. Count IV — Breach of Fiduciary Duty Count VIII — Negligence

AFCSME's complaint also states claims for breach of fiduciary duty (Count IV) and negligence (Count VI). AFSCME argues that these claims do not rest on agreements of any kind. The FDIC responds that they are simply attempts to recast plaintiff's misrepresentation claims. These claims, though distinct, raise similar issues as plaintiff's misrepresentation claims treated in the previous sections. Once again, the source of NBW's duty to investors is crucial. If the duty is based on an unwritten agreement, as plaintiff's misrepresentation-type claims are, then *D'Oench* applies.

The court, however, is not convinced that plaintiff's claim for breach of fiduciary duty is based on an unwritten agreement; plaintiff alleges a duty independent of any agreement concerning safe investment. *See Garrett v. Commonwealth Mtge. Corp.*, 938 F.2d 591, 594 (5th Cir. 1991). If plaintiff can establish this independent duty, then the claim would be connected to an agreement or an arrangement which would tend to deceive bank examiners.[35] The sale itself would be sufficient to

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this) and the misrepresentations and material omissions were conditions to performance. AFSCME states that they do not "contend that any duty of performance it has under an agreement with NBW is now excused" because of NBW's misrepresentations; this is not so — the duty they are seeking to escape is the duty to pay the purchase price for the commercial paper, however worthless it may be now.

[35] The FDIC argues in summary fashion that a bank generally has no fiduciary duty to depositors to invest their money wisely. The court shall not, however, rule on the issue of a fiduciary duty to these plaintiffs at this time because neither party have briefed the issues in full.

create the bank's liability. The FDIC cites numerous cases in which courts have held that breach of fiduciary duty claims are barred by *D'Oench*. *See, e.g., Beighley v. FDIC*, 868 F.2d 776 (5th Cir. 1989); *Oliver v. RTC*, 747 F.Supp. 1351, 1352 (E.D.Mo. 1990). Yet these cases forbid the assertion of a fiduciary duty claim when the fiduciary duty is itself based on the oral representations or agreements not recorded in the bank's records. Where the basis of the fiduciary relationship derives from a source other than an unwritten agreement, *D'Oench* does not apply. *Tuxedo Beach Club Corp. v. City Fed. Sav. Bank*, 749 F.Supp. 635 (D.N.J. 1990). AFSCME's complaint locates the source of the duty in the relationship (broker/agent) between NBW and AFSCME, not in any statements made by NBW. Indeed, the essence of AFSCME's claim against its agent is self-dealing, which does not depend on any agreement or representation. Thus, at this time, the court cannot say that *D'Oench* bars Count IV of AFSCME's complaint. This result demonstrates how difficult it becomes to apply *D'Oench* outside the traditional borrower context. Any fiduciary relationship between a lender and a borrower would likely derive from some agreement of the parties or some representation made by one of the parties; thus *D'Oench*, or more likely § 1823(e) and § 1821(d) (9) (A), would often apply. In this context, however, where the relationship was allegedly that of investor and agent, NBW may have had a duty because of its role as investment broker for AFSCME.[36]

Plaintiff's negligence claim may similarly survive *D'Oench*. *See Garrett*, 938 F.2d at 594. Plaintiff's claim is that the bank violated a duty of care simply by investing in WBC

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[36] The FDIC argues that a bank owes no general duty to a depositor concerning the safety of investments made with deposited funds. The FDIC did not cite any cases from this jurisdiction and the court will not decide this issued without substantially more briefing by the parties. In addition, AFSCME's status as an investor, rather than an ordinary depositor, may make the cases cited by the FDIC inapposite.

commercial paper which it knew was worthless. This duty does not appear to derive from any unwritten agreement not to depend on any material omissions or misrepresentations. AFSCME alleges that the fact of the sale itself was a breach of this duty of care. The court notes that *D'Oench* may be an appropriate defense to both of these claims if they require an unwritten agreement to establish them, but the court will not dismiss them at this time.

VI. Other Defenses to AFSCME's § 12(1) Claim

A. Preclusion

AFSCME in its opposition argues that the FDIC should not be permitted to raise any defenses which they did not cite in their letter of denial. Under FIRREA, the FDIC must notify a claimant within 180 days whether it will allow or disallow a claim. *See* 12 U.S.C. § 1821 (d) (5) (A) (i) (1991). In its notices of disallowance, the FDIC must provide "a statement of each reason for the disallowance." 12 U.S.C. § (d) (5) (A) (iv) (1991). Plaintiff once again argues for a strict construction of the statute to give teeth to the words "each reason." The FDIC argues that plaintiff's interpretation of the statute is unreasonable. If plaintiff's interpretation were correct, the FDIC would not be able to assert any defenses to claims to which they did not respond within the 180-day period.[37] Congress, however, foresaw this possibility by permitting claimants to file a district court action if the FDIC neither allowed nor disallowed their claim. Congress clearly would not have created such a procedure had it intended that the FDIC could not have no defense in these district court actions. Further, requiring the FDIC to seek out every possible reason for a denial could force the agency to

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[37] In a sense, AFSCME's argument is not much different than that made by plaintiff International Association of Machinists and Aerospace Workers, who argue that , by not responding within the 180-days, the FDIC concedes the validity of its claim. The court rejects both plaintiffs' arguments.

divert scarce resources to this process, thereby undermining the streamlined administrative process which Congress intended to create. Thus, the court holds that § 1821 (d) (5) (A) (iv) does not bar the FDIC from raising defenses other than those noted letters of disallowance.

B. Statute of Limitations

The FDIC alternatively argues that all of the plaintiffs failed to satisfy the statute of limitations applicable to their § 12(1) claims. Under § 13 of the 1933 Securities Act, a plaintiff must both file its action within one year after the violation upon which it is based and also within "three years after the security was bona fide offered to the public." 15 U.S.C. § 77m (1991). There is not dispute that AFSCME and the other plaintiffs have fulfilled the first prong of § 13, but the FDIC argues that WBC commercial paper was first offered to the public in 1984, and thus that AFSCME's suit, filed as an administrative claim on August 17, 1990, is time-barred. Plaintiff responds that this result is absurd, since WBC and NBW did not actually violate § 12(1) until April of 1990 when the supporting lines of credit were withdrawn. Thus, under the FDIC's theory, the statute of limitations would have run before the cause of action accrued and indeed before the NBW ever violated § 12(1) as to any purchaser or commercial paper.

Despite the unusual result of FDIC's argument, the FDIC cites cases to support their proposition. *See, e.g., Waterman v. Alta Verde Indus., Inc.*, 643 F.Supp. 797 (E.D.N.C. 1986), *aff d*, 833 F.2d 1006 (1987); *Morley v. Cohen*, 610 F.Supp. 798 (D.Md. 1985); *LeCroy v. Dean Witter Reynolds, Inc.*, 585 F.Supp. 753 (E.D.Ark 1984).[38] The court finds none of these cases persuasive, and indeed, believes that they do not stand for the interpretation which the FDIC asks the court to espouse.

[38] At least two of these courts expressed some concerns about the inequity of the statute of limitations. *See Waterman*, 643 F.Supp. at 808; *LeCroy*, 585 F.Supp. at 760.

None of these courts faced the situation at issue here, where a seller sold legal commercial paper for several years and then subsequently sold illegal commercial paper.[39] All of the other courts simply found that the three-year statute of limitations was an independent requirement from the one-year provision and that the plaintiffs in those cases had failed to file their actions within that three years. The logic behind these opinions suggests the rationale of the two statute of limitations. The one-year requirement, as any other statute of limitations, is designed to insure that purchasers of securities file their claims promptly. The three-year provision is "a trap for the unwary investor." *LeCroy*, 585 F.Supp. at 760. If an illegal security, such as one that is unregistered and not "prime," has been offered for three years, investors who do a little research should become aware of such problems. The three-year statutes of limitations places the risk on investors who do not sufficiently consider investments with a longstanding track record.

In the case of AFSCME, the three-year statute of limitations does not bar this action. Although WBC commercial paper of prime quality was first offered to the public in 1984, it was not until April of 1990 that the allegedly illegal commercial paper was offered for sale. These sales, made after the lines of back-up credit were withdrawn, constitute the offering of a different security for the purpose of § 13 and thus, the three-year

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[39] The FDIC states that plaintiff in *Waterman v. Alta Verde Industries, Inc.*, 643 F.Supp 797 (E.D.N.C. 1986), made the same argument as AFSCME does and quotes language from that opinion rejecting the argument. Plaintiffs in *Waterman*, however, although arguing that the same inequities would result from the defendant's interpretation as AFSCME, claims would result from the FDIC's interpretation, argued that the three-year statute of limitations should accrue when the paper was *last* offered to the public. There the court, although not pleased with the result, rejected plaintiff's interpretation which was clearly contrary to the plain meaning of the statute. AFSCME stands in a significantly different posture and asks the court to accept a much more plausible reading of the plain language of the statute.

statute of limitations began to run in April of 1990. Because AFSCME filed its administrative action in August of 1990, they have satisfied the requirements of § 13 and their claim is not time-barred.

VII. FDIC's Motion to Strike

The FDIC moves to strike various of AFSCME's prayers for relief, including its claims for rescission, interest, attorney's fees, and punitive damages. The FDIC argues that under no circumstances, as a matter of law, are any of these types of relief available against the FDIC. AFSCME focuses its arguments on the high standard which a party must meet in order to win a motion to strike and reminds the court that it is a "drastic remedy." 5A Wright & Miller, Federal Practice and Procedure § 1380, at 647 - 49 (1990).

The FDIC's motion to strike AFSCME's claim for rescission presents a clash between two heavy burdens. The high hurdle engendered by a motion to strike is offset in this case by the heavy burden which a plaintiff must bear in order to overcome the preference for *pro rata* distribution which FIRREA and its predecessors embody. Plaintiff suggests a variety of scenarios where they might be able to obtain rescission and the FDIC demonstrates that these scenarios are unlikely and contrary to federal policy. Despite the court's belief that it is highly unlikely that AFSCME will be able to overcome the motion favoring *pro rata* distribution, the court is unwilling to grant the motion to strike on the basis of a policy, as opposed to a more clear rule of law. Even the FDIC's citation of § 1821(i) (2), which establishes the maximum liability of the FDIC in its capacity as receiver, does not appear determinative of the issue. The court will await further development of the facts in this case before deciding the issue of rescission.

For similar reasons the court will deny the motion to strike with respect to interest. Interest generally is unavailable because it tends to undermine the preference for ratable distribu-

tion, but plaintiffs may recover interest under certain very specific circumstances depending both on the outcome of the case and the actions taken by the FDIC as receiver for NBW in settling creditors' claims. The plaintiff notes that the receiver may have already paid out a substantial dividend to the creditors of NBW, to which AFSCME may someday be entitled — with interest. As for attorneys' fees, the court again notes that it is highly unlikely that AFSCME will be able to obtain attorneys' fees. Indeed, the only method by which AFSCME argues that they may have a claim for attorneys' fees appears to depend not on the outcome of this case, but rather on the conduct of the FDIC's attorneys. Under the Equal Access to Justice Act, plaintiff may recover attorneys' fees if the FDIC's counsel take a substantially unjustified position in this case. Although one court has permitted a plaintiff to maintain such a claim because of the provisions of the EAJA, *see Royal Bank v. FDIC*, 733 F.Supp. 1091, 1099 (N.D.Tex. 1990), this court will grant the motion to strike with regard to attorneys' fees. If the FDIC takes a substantially unjustified position in this case, the court will permit the plaintiff to seek attorneys' fees at that time.

Plaintiff agrees that the FDIC is not be liable for punitive damages because Congress has not expressly authorized such liability and AFSCME has withdrawn its plea for punitive damages. The court notes that this position is in accord with all authorities. The FDIC's motion to strike the prayer for punitive damages shall be denied as moot.

VIII. FDIC's Second Motion to Dismiss — The Supplemental Claims

On November 1, 1991, the FDIC moved to dismiss all of the claims in the other 20 commercial paper cases against the FDIC as receiver. The FDIC stands, more or less, on the arguments it raised in its motion to dismiss the AFSCME complaint. While most of the other plaintiffs adopt the memoranda filed by AFSCME's counsel, various plaintiffs have

filed additional objections to FDIC's arguments in general and to the motion to dismiss as it relates to specific claims raised by their complaints. Because most of the analysis is identical to that which the court performed concerning the motion to dismiss the AFSCME complaint, the court will deal with these claims in even more summary fashion.

A. Misrepresentation-type Claims

For the reasons discussed in Part V(B) of the court's opinion above, all claims styled as fraud, deceit, false representation, fraudulent misrepresentation,[40] violation of § 12(2) of the 1933 Securities Act, violation of § 10(b) of the 1934 Securities Exchange Act, or violation of the District of Columbia's Blue Sky Law[41] shall be dismissed as barred by the *D'Oench* doctrine.

B. Violations of § 12(1) of the 1933 Securities Act

For the reasons discussed in Part V(A) of the court's opinion above, the motion to dismiss plaintiffs' § 12(1) claims shall be denied.

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[40] The FDIC suggests that negligent misrepresentation claims are analytically similar to claims of negligence. At this time, the court does not believe that this is correct. The two types of claims are similar as to the required state of mind, but unrecorded misrepresentations are barred by *D'Oench*, whereas other types of negligence may not be.

[41] Plaintiff T.J.B., Inc. (C.A. No. 91-1704) alleges violations of unspecified provisions of the Virginia Blue Sky law. Because the court cannot determine what provisions of the law the plaintiff is relying on, the court will await further clarification of this claim before deciding if it should be dismissed.

C. Breach of Fiduciary Duty and Negligence

For the reasons discussed in Part V(C) of the court's opinion above, the motion to dismiss plaintiffs' breach of fiduciary duty and negligence claims shall be denied.[42]

D. Conversion

Certain plaintiffs allege the tort of conversion. The basis of the claim is that NBW, as a subsidiary of WBC, the issuer of the commercial paper, essentially exercised dominion over these plaintiffs' deposits by purchasing worthless commercial paper. In essence, they allege that the commercial paper sale was a sham and that their money was simply stolen. The factual predicate of this claim is fundamentally different than that for claims of fraud or misrepresentation. Plaintiffs may need to prove an agreement to win on this claim: the illegal exercise of dominion over their money may be based on an agreement that the funds would be used in a certain way: if so, *D'Oench* may bar these claims. Nonetheless, conversion may be proven without reference to an agreement at all. Thus, the court will not dismiss the plaintiffs' conversion claims at this time.

E. Breach of Contract

Several plaintiffs[43] allege a written agreement as the basis for a breach of contract claim. They claim that their Master Repurchase Agreement defines the terms of their contractual relationship and that NBW's purchase of commercial paper was a breach of this contract. The FDIC argues that the repurchase Agreement has no connection to the purchases of WBC com-

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[42] Plaintiff Columbia Real Estate & Title Insurance Co. (C.A. No. 90-1702) alleges a separate breach of fiduciary duty claim arising out of statements made by an officer of NBW. Because this claim appears to be based on misrepresentations, it is barred by *D'Oench* and shall be dismissed.

[43] These plaintiffs include The George Hyman Construction Co. and Hyman-Stubbins, Inc., Civil Action No. 90-1297; Ward Corp., Civil Action 90-1810; and International Association of Machinists and Aerospace Workers, Civil Action No. 90-1822.

mercial paper, which were made pursuant to a separate course of dealing to which the plaintiffs acceded. Each side submits documents to support their claim and invited the court to transform the motion in to a Rule 56 motion for a judgment as a matter of law.

The court will decline the opportunity to turn this motion into a Rule 56 motion. Neither party has fully presented their evidence in a form appropriate for a disposition under Rule 56. Further, the factual issues raised by each side indicate that these claims may not be appropriately disposed of on a motion to dismiss. The FDIC alleges that the purchase of WBC commercial paper through their acceptance of confirmation slips. The court cannot resolve this issue as a matter of law at this time. Thus, the FDIC's motion to dismiss these plaintiffs' breach of contract claim shall be denied.[44]

F. Prayers for Relief

For the reasons stated above in Part VII of the court's opinion, the FDIC's motion to strike with regard to punitive

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[44] Telement America, Corp. (No. 90-1753) alleges the existence of a written contract based on a letter send by Telemet to NBW authorizing a Telemet employee to make only certain kinds of investments. The court does not believe that Telemet can meet any writing requirement under *D'Oench* since some kind additional oral understanding would have to be plead for Telemet to establish its contract. Thus, the motion to dismiss Telemet's breach of contract claim shall be granted. Kaempfer Co. (C.A. No, 90-1696) and Thomas Dodd (C.A. No. 90-1875) also allege breach of contract claims. Neither alleges the existence of a written contract, but each seeks discovery to see if there is anything in NBW's files that might suffice. Because they cannot in good faith assert the existence of such an agreement and because customers bear some burden for maintaining the records of their transactions, the court will not permit discovery on this issue and these plaintiffs breach of contract claims shall be dismissed. In addition, the motion to dismiss shall be granted with respect to the breach of contract claims of plaintiffs National Theater Corp. (C.A. No. 90-1837) and World Plan Executive Council (C.A. No. 90-1841), which appear to be based solely on oral agreements.

damages and attorneys' fees shall be granted, while the FDIC's motion to strike interest and rescission shall be denied. In addition, the FDIC's motion to strike plaintiffs' claims for a constructive trust shall be denied for reasons that the court discussed above concerning the availability of rescission.

IX. Conclusion

The court is not ignorant of the unusual results which the *D'Oench* doctrine generates, nor is the court enamored of them. *D'Oench* creates a mine field for plaintiffs. It may seem odd that plaintiffs may recover on some claims but not others, even though these other claims appear to involve more heinous conduct on the part of the failed bank's officials. Yet the combination of *D'Oench* and the structure of the tort system insures that plaintiffs who have not violated the equitable tenets of the doctrine can recover under some theory. Further, this regime is not one that simply rewards artful pleading. *D'Oench* tells bank customers that they should not rely on anything (agreement, representation, or unstated assumption) that is not recorded in the bank's records. They probably will be unable to recover if they assert anything that was said orally or on which they relied, yet failed to have recorded. *D'Oench* places the blame, however, slight, on the customer and relieves the FDIC of responsibility. If, however, the bank violates the law and creates liability that is unconnected to an unrecorded agreement or representation to the customer, then the FDIC and the customer stand in the same position; the customer could have done nothing to protect himself and the factual predicate for the claim is on the books for a bank examiner. In these situations, where the equities are equal, *D'Oench* relents.

For the foregoing reasons, the FDIC's motion to dismiss the AFSCME complaint shall be GRANTED in part and FDIC's motion to dismiss the supplemental counts shall be GRANTED in part in a separate order filed on this date.

/s/

Royce C. Lamberth
United States District Judge

Date: Mar. 11, 1992

(2)

Supreme Court, U.S.
FILED
JUL 26 1993
OFFICE OF THE CLERK

No. 92-1902

In the Supreme Court of the United States

OCTOBER TERM, 1993

VIENNA MORTGAGE CORPORATION, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR NATIONAL BANK OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Deposit Insurance Corporation, in its capacity as receiver, is subject to a written agreement that the predecessor financial institution did not execute.

2. Whether petitioner's counterclaim against the Federal Deposit Insurance Corporation properly was dismissed based on petitioner's failure to exhaust its administrative remedies in accordance with 12 U.S.C. 1821(d) (Supp. III 1991).

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1902

VIENNA MORTGAGE CORPORATION, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR NATIONAL BANK OF WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unreported, but the judgment is noted at 985 F.2d 553 (Table). The orders of the district court (Pet. App. B1, B2) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1993. A petition for rehearing was denied on March 2, 1993. Pet. App. C1-C2. The petition for a writ of certiorari was filed on May 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 7, 1988, petitioner (then known as the Washington Mortgage Group) and the National Bank of Washington entered into a Whole Loan Sale and Servicing Agreement (Servicing Agreement). Under the Servicing Agreement, petitioner made real estate mortgage loans, which the bank purchased. Petitioner serviced the loans in return for a fee. The bank had the right to terminate the Servicing Agreement without cause on 30 days' notice, without any further obligation to petitioner. The Servicing Agreement also provided that it could not "be modified in any respect except by an amendment in writing signed by both parties." At the time the Servicing Agreement was signed, both petitioner and the bank were subsidiaries of Washington BanCorporation, a Delaware bank holding company. See Pet. App. A3.

On May 19, 1990, the holding company entered into a Stock Purchase and Investment Agreement with Washington Mortgage Acquisition, Inc. (WMA), in which the holding company agreed to sell all of petitioner's stock to WMA. The terms of that document provided that petitioner would continue to service mortgages held by the holding company and its subsidiaries. When the transaction closed on June 29, 1990, petitioner and the holding company executed a document styled "Amendment To Whole Loan Sale and Servicing Agreement," which purported to amend the Servicing Agreement between petitioner and the bank to provide for a substantial termination fee if the bank terminated the Servicing Agreement without cause. Although the document identified "WASHINGTON BANCORPORATION * * * and its

subsidiaries" as the "Purchaser," the signature lines did not provide for execution by the bank. The minutes of the meetings held by the bank's board of directors do not reflect approval of the document by the bank. C.A. App. 59, 63, 120-122, 242-306, 310-414; see Pet. App A4.

On August 10, 1990, the government declared the bank insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver for the bank. On October 25, 1990, the FDIC gave petitioner 30 days' notice of its intention to terminate the Servicing Agreement between petitioner and the bank. Petitioner responded by turning over funds in its possession, as required by the agreement, except that it retained about $770,000 as a termination fee based on the terms of the Amendment executed by petitioner and the holding company. See Pet. App. A4-A5.

2. On August 2, 1991, the FDIC instituted this action against petitioner in the United States District Court for the Eastern District of Virginia, seeking to recover damages in an amount equal to petitioner's termination fee. Petitioner filed a counterclaim asserting that it was entitled to the termination fee under the Amendment; that the FDIC's attempt to deprive petitioner of its termination fee constituted a breach of contract; and that allowing the FDIC to void the Amendment while retaining the consideration for the Amendment would enrich the FDIC unjustly. Pet. App. A5.

The district court disposed of the substantive issues in the case in two brief orders. First, the court dismissed petitioner's counterclaim without prejudice "based upon [petitioner's] failure to exhaust

the appropriate administrative procedures." Pet. App. B1. Second, the court granted the FDIC's motion for summary judgment based on its conclusions that the Amendment "is an agreement within the meaning of 12 U.S.C. § 1823(e), and that the agreement is not valid against the [FDIC] because the provisions of 12 U.S.C. § 1823(e) were not complied with." Pet. App. B2.

3. The court of appeals affirmed. Pet. App. A1-A10. On the FDIC's claim, the court explained that 12 U.S.C. 1823(e) (Supp. III 1991) bars enforcement of any "agreement" that "tends to diminish" the FDIC's interest in any "asset," unless the agreement is signed by the failed institution and approved by the board of directors or its loan committee. Because the Amendment did not meet those requirements, it could not be valid against the FDIC. Pet. App. A5-A7. The court also affirmed the district court's conclusion that petitioner's counterclaim should be dismissed based on petitioner's failure to exhaust its administrative remedies as required by Section 1821(d). The court rejected petitioner's argument that it would have been futile to pursue the claim administratively. Pet. App. A8-A10.

ARGUMENT

1. Petitioner argues (Pet. 15-27) that the lower court erred in dismissing petitioner's claim under the Amendment to the Servicing Agreement as barred by 12 U.S.C. 1823(e) (Supp. III 1991). That argument cannot be reconciled with the language of the statute. Section 1823(e) provides broadly that "[n]o agreement which tends to diminish * * * the interest of the [FDIC] in any asset acquired by it * * * as receiver of

any insured depository institution, shall be valid against the Corporation" unless specified requirements are met. Because the Amendment plainly is an agreement, and just as plainly would diminish the FDIC's interest in the assets it acquired as receiver for the failed bank, the Amendment cannot be valid against the FDIC unless it meets the requirements of Section 1823(e).

The agreement does not satisfy the requirements of Section 1823(e), because it was not "executed by the depository institution," 12 U.S.C. 1823(e)(2) (Supp. III 1991), and because no "approv[al] by the board of directors of the depository institution or its loan committee * * * [is] reflected in the minutes of [the bank's] board or committee," 12 U.S.C. 1823(e)(3) (Supp. III 1991). Accordingly, the lower courts correctly refused to enforce the Amendment against the FDIC as receiver for the failed bank. See, *e.g.*, *RTC* v. *Ruggiero*, 977 F.2d 309, 315 n.6 (7th Cir. 1992) (document signed by borrower but not lender cannot bind RTC as receiver); *Twin Construction, Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378, 383-384 (11th Cir. 1991) (document in files of failed institution does not bind receiver because it was not signed by institution).*

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* Petitioner errs in asserting that the decision conflicts with decisions of the Seventh and Eleventh Circuits. See Pet. 18-20 (citing *Howell* v. *Continental Credit Corp.*, 655 F.2d 743, 746-747 (7th Cir. 1981); *FDIC* v. *Merchants National Bank*, 725 F.2d 634, 639 (11th Cir.), cert. denied, 469 U.S. 829 (1984)). *Howell* involved a "bilateral" agreement (that is, an agreement executed by the parties sought to be bound), 655 F.2d at 747, and the only apparent relevance of *Merchants* is that it cited *Howell*'s discussion of the enforceability of bilateral agreements, 725 F.2d at 639.

dence Joint Venture v. *FSLIC*, 489 U.S. 561, 579 (1989); *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975); *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 136 (3d Cir. 1991); see also *Rosa*, 938 F.2d at 395 (declining to decide if exhaustion is always required because no basis for forgiving failure to exhaust in that case). In any event, both of the lower courts concluded that petitioner had failed to establish that resort to the administrative process would be futile, and petitioner offers no basis for supposing that it would be useful for this Court to review that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1993

No. 92-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

VIENNA MORTGAGE CORPORATION,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for the National Bank of Washington,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION OF PETITION FOR CERTIORARI

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REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition of the Federal Deposit Insurance Corporation ("the FDIC") is remarkable only because it offers nothing more than facile treatment for a complex case of national importance. Nowhere does the Opposition dispute that this case raises significant, recurrent issues about the power of federal regulatory agencies acting as receivers for failed depository institutions. Nowhere does it offer any reason why petitióner's claims were adjudicated under a standard different from that governing every other claim involving the FDIC in its capacity as receiver for the National Bank of Washington ("NBW"). The Opposition does not dispute that this case represents a unique application of 12 U.S.C. § 1823(e) in a context outside of suits on promissory notes, an application inconsistent with the statute's thirty year history and the precedent of every other federal court which has considered this issue. Nor does it suggest that petitioner's right to a setoff went uncontested below. For these reasons, and others explained below, petitioner respectfully submits that the standards for the issuance of a writ of *certiorari* have been satisfied.

I. The Agreement Which Codified VMC's Right To A Termination Fee Was Multilateral And Executed By NBW.

The FDIC's Opposition rests entirely upon a superficial premise; namely the contract providing for petitioner's termination fee supposedly "was not executed by" NBW in a manner required by 12 U.S.C. § 1823(e) and, therefore, it could not have been part of an enforceable multilateral agreement governing the sale of Vienna Mortgage Corporation ("VMC") to its current owner (Br. in Opp. at 5 & n.*). This argument fails to acknowledge that VMC has never suggested that the Amendment to the Whole Loan Sale and Servicing Agreement was executed in a manner which satisfied the standards of enforceability under section 1823(e).[1] Rather, VMC has demonstrated that the requirements of the statute are immaterial because the Amendment was part of a multilateral contract, one which NBW was a party.

The FDIC agrees with the principle of law that bilateral agreements with failed depository institutions are indeed enforceable without regard the requirements of section 1823(e) (Br. In Opp. at 5, n.*). Its argument that NBW was not a party to the Amendment to the Whole Loan Sale and Servicing Agreement is at odds with the undisputed evidence and binding precedent of this Court and the Fourth Circuit, as shown in the Petition for a Writ of Certiorari (at 22-24). In the undisputed words of petitioner's president, the Amendment to the Whole Loan Sale and Servicing Agreement which provided VMC to be paid a fee in the event of its termination as NBW's mortgage servicer was part of a larger, multi-party contract (JA 425-26). Absent agreement to pay this fee, NBW would never have been paid in excess of $3.6 million for the sale of VMC (JA 42221-22, 425-27,

[1] It bears mentioning that the person who served as the Chief Financial Officer of NBW executed the Amendment (JA 120-23) and that, as the FDIC knew, NBW's board was fully briefed on the substance of the transaction before it was consummated (JA 101).

439-41, 443). The Amendment to the Whole Loan Sale and Servicing Agreement was not, as the FDIC contends, an unenforceable unilateral agreement but a "component part" of a larger, integrated transaction (*Id.*).

This Court has clearly held that "contracts must be considered together" and not read as separate entities where calling them "distinct transactions is to ignore reality." *Helvering v. Le Geirse*, 312 U.S. 532, 540 (1941); *accord D.H. Pritchard, Contractor, Inc. v. Nelson*, 147 F.2d 939, 942 (4th Cir. 1945). They are to be treated as parts of an integrated whole even where, as here, each component agreement is not signed by every party. *Hampton Roads Shipping Ass'n v. Int'l Longshoremen's Ass'n*, 597 F. Supp. 709, 716 (E.D. Va.), *remanded on other grounds*, 746 F.2d 1015, *cert. denied*, 471 U.S. 1017, 1102 (1984). This is particularly true in this case because other components of the agreement of sale specifically referred to NBW as a party to the Amendment to the Whole Loan Sale and Servicing Agreement (JA 185-86).

Although the decision of the court of appeals did not appreciate the significance of this issue, petitioner and respondent do and both agree that the outcome of this case turns upon whether the Amendment was an isolated agreement between VMC and Washington Bancorporation ("WBC") or a part of a larger, multilateral transaction to which NBW was also a party (*Compare*, Pet. for Writ of Cert. at 17-21 *with* Br. in Opp. at 5, n.*). This is so because, as the Petition for a Writ of Certiorari carefully documents, every federal court which has addressed this issue has concluded that 12 U.S.C. § 1823(e) does not authorize the FDIC and its sister regulatory agencies to declare bilateral contracts with failed banks unenforceable. Rather, that statute applies exclusively to agreements relating to promissory notes and related unilateral obligations. *FDIC v. McClanahan*, 795 F.2d 512 (5th Cir. 1986); *FDIC v. Merchants National bank*, 725 F.2d 634 (11th Cir. 1969); *Howell v. Continental Credit*

Corp., 655 F.2d 743 (7th Cir. 1981); *Agri Export Cooperative v. Universal Savings Ass'n v. RTC*, 767 F. Supp. 824 (S.D. Tex. 1991); *Riverside Park Realty Co. v. FDIC*, 465 F. Supp. 305 (M.D. Tenn. 1978). Indeed, this is the conclusion of the very court which has jurisdiction over every other affirmative claim against the FDIC as receiver for NBW. *In Re NBW Commercial Paper Litigation* ("*In Re NBW*"), Master File No. 90-1555, Civil Action No. 91-0626 (RCL) (D.D.C. Mar. 11, 1992) (G1-54[2]).

The FDIC offers no sound reason for the Fourth Circuit's departure from the foregoing line of authority.[3] Nor does it explain why the outcome in this case is different from the decision in *In Re NBW*. The reason is simple. *In Re NBW* was correct and hence not appealed further. The instant case was erroneous which, unfortunately, is not preventing the FDIC from citing it as the law of the Fourth Circuit (App. J). Review by this Court is necessary to correct the Fourth Circuit's error, reconcile its conflict with other circuits, and resolve this issue of national significance.

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[2] The reference "G1-54" is to that portion of the Appendix which accompanies the Petition for a Writ of Certiorari.

[3] Indeed, the principal authority upon which the FDIC relies expressly states that section 1823(e) "mandates that agreements between a borrower and a lender *concerning a loan* may not be read to defeat" the federal government's interest in the assets of a failed bank. *RTC v. Ruggiero*, 977 F.2d 309, 315 (7th Cir. 1992) (emphasis supplied). The sole remaining authority cited by the FDIC concerns itself with repayment and remedies under a construction loan and is to the same effect. *Twin Construction, Inc. v. Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991).

II. The Brief In Opposition Fails To Respond To The Significant Errors In The Decision Below Identified In The Petition For A Writ Of Certiorari.

The Petition for a Writ of Certiorari (at 15-21) advances many powerful grounds for concluding that the decision below was erroneous. The strategy behind the FDIC's Brief in Opposition is perplexing — it simply ignores every one. That the FDIC has done so does not mean, however, that this is an ordinary case representing a routine application of 12 U.S.C. § 1823(e).

Since the days of its original enactment in 1950, section 1823(e) has been consistently applied to invalidate secret payment terms not recorded on the face of promissory notes and related obligations. *E.g.*, *FDIC v. Hatmaker*, 756 F.2d 34, 37 (6th Cir. 1985). In point of fact, the only authority identified by the court of appeals in support of its decision below concerned applications of the statute in the context of a suit on a promissory note. *RTC v. McCrory*, 951 F.2d 68 (5th Cir. 1992); *FDIC v. Wright*, 942 F.2d 1089 (7th Cir. 1991); *Carteret Sav. Bank, F.A. v. Compton, Luther & Sons*, 899 F.2d 340 (4th Cir. 1990). Every case identified by respondent during the course of this litigation concerned an application of the statute within this context. And every attempt by a federal bank regulatory agency to apply section 1823(e) elsewhere was rejected by the courts. *See supra* at 3-4.

Aware of the consistent judicial interpretation of the statute, Congress reenacted section 1823(e) without any alteration in its scope as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Congress' action means that it accepted the courts' application of section 1823(e) as correct and discerned no reason for its amendment. *See Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986). But now, alone among the courts of appeals and in the face of this

Congressional action, the Fourth Circuit has endorsed a far broader application of section 1823(e). The effects of this decision include overruling by implication the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), and forcibly restructuring the ordinary course of business dealings between banks and parties who contract with them. *Agri Export Cooperative*, 767 F. Supp. 833-34; *In Re NBW* (G26-27). That these are the effects of the decision below is not disputed in the Brief in Opposition. So sweeping and important a decision must be reviewed by this Court.

III. *Langley v. FDIC* Does Not Bar Equitable Defenses Based Upon The FDIC's Conduct.

In *Langley v. FDIC*, 484 U.S. 86 (1987), this Court granted *certiorari* to resolve a previous conflict between the circuits as to whether fraud on the part of officers of a failed bank provided grounds for excusing compliance with 12 U.S.C. § 1823(e). The *Langley* decision resolved that question in the negative. Seeking to take that decision one step farther, the FDIC argues that *Langley* immunizes conduct of its own officials from judicial scrutiny even where, as here, the transaction in question was undertaken with the knowledge, encouragement and assent of the FDIC and its sister regulatory agencies.

There is no precedent to this effect. For the reasons discussed previously in the Petition for a Writ of Certiorari (at 24-27), there should not be. Where, as here, the FDIC and its sister regulatory agencies actively encouraged a transaction, pledged to honor that transaction in the event of a bank's subsequent insolvency, and retained the consideration received by the bank in that transaction, there is every reason to estop the FDIC from interposing 12 U.S.C. § 1823(e) in later litigation. *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 61-62 (1984).

Although VMC will not reiterate the arguments it has made earlier, there is one remarkable contention of the FDIC which simply cannot go left unrebutted.

The Brief in Opposition (at 6) asserts that: "Petitioner cites no decision of any court allowing a party to interpose [an equitable] defense" to an action brought by the FDIC as receiver of a failed bank. In point of fact, the Ninth Circuit specifically affirmed the application of equitable estoppel against the FDIC in an action brought as "liquidating agent or receiver of an insolvent bank" that was governed by application of 12 U.S.C. § 1823(e) "where, as here, the conduct of the FDIC itself gave rise to the defense of estoppel." *FDIC v. Harrison*, 735 F.2d 408, 412-13, n.6 (9th Cir. 1984). This very decision was addressed in the Petition for a Writ of Certiorari (at 25-26), which demonstrates not only that respondent's research and arguments are faulty but that it has paid inadequate attention to the issues raised by petitioner. *See also FDIC v. Panelfab Puerto Rico, Inc.*, 739 F.2d 26, 30 (1st Cir. 1984) (estopping the FDIC from invoking section 1823(e) in an action concerning revocation of a guaranty).

IV. Resort To The Administrative Claims Process Should Not Have Been Required Where, As Here, The Parties' Claims Were Inextricably Intertwined.

VMC unsuccessfully exhausted the administrative process on its affirmative claims and was barred from proceeding in district court by virtue of the outcome in this case even before the court of appeals heard argument below (D1-2). Ignoring these proceedings, the FDIC argues "that petitioner . . . failed to establish that resort to the administrative process would be futile" and that there is no reason for "supposing that it would be useful for this Court" to review this issue (Br. in Opp. at 8). The first portion of this argument can be easily refuted by a review of the record below (D1-2). The second upon appreciating that VMC was deeply prejudiced not merely by being

required to exhaust illusory administrative process, but by having to do so while the FDIC's case proceeded. This prejudice, the mechanism of which was explained in greater detail in the Petition for a Writ of Certiorari (at 27-30), warrants further review of this issue by this Court.

V. This Proceeding Cannot Properly Conclude Without An Adjudication Of VMC's Right To A Setoff.

The Petition for a Writ of Certiorari (at 21) clearly states that the FDIC "never disputed VMC's right to an offset or credit against the judgment." Nonetheless, the court of appeals allowed this case to conclude with the entry of a judgment in the gross amount of VMC's obligation without reduction for its undisputed setoff (*Id.*). The Brief in Opposition neither denies the accuracy of VMC's arguments nor justifies the lower court's inaction. And well it should not for elsewhere, the FDIC has readily reduced the judgment sought in an action concerning an agreement rendered invalid by application of section 1823(e) by the amount of consideration received by the failed bank in that same transaction. *FDIC v. Manatt*, 688 F. Supp. 1327, 1323 (E.D. Ark. 1988), *aff'd*, 922 F.2d 486 (8th Cir.), *cert. denied*, 111 S.Ct. 2889 (1991).

Regardless of the merits of the arguments advanced by the FDIC in general and against VMC's affirmative claims in particular, there is no disputing that this case was terminated prematurely without a reduction in VMC's favor. Even should the Court not grant *certiorari* and review this case in its entirety — and petitioner respectfully submits that it should — it should nonetheless be remanded to the court of appeals for further proceedings concerning VMC's right to a reduction in the judgment. There is simply no reason why the consequences of the lower court's adverse decisions should be compounded by the entry of a judgment against VMC in an amount that fails to take account of the credit to which it is entitled, a setoff which the FDIC itself does not dispute.

CONCLUSION

For the foregoing reasons and those expressed in its Petition for a Writ of Certiorari, petitioner Vienna Mortgage Corporation respectfully requests that the Court issue a writ of certiorari to review the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 92-1019 and 92-1020

FEDERAL DEPOSIT INSURANCE CORPORATION
AS RECEIVER FOR
NEW BANK OF NEW ENGLAND, N.A.
Plaintiff, Appellee, Cross-Appellant,

v.

MARINE MIDLAND REALTY CORPORATION, *et al.*,
Defendants, Appellants, Cross-Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia Alexandria Division

BRIEF OF THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR NEW BANK OF NEW ENGLAND, N.A. AS APPELLEE/CROSS-APPELLANT

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